No. 71-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

MUNICIPAL LIGHT BOARDS OF READING AND WAKEFIELD, MASSACHUSETTS,
Petitioners

v.

FEDERAL POWER COMMISSION,
BOSTON EDISON COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Municipal Light Boards of the Towns of Reading and Wakefield, Massachusetts, Petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on October 14, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra* pp. 1-23) is not yet reported. The order of the Federal Power Commission issued April 29, 1970 (Appendix B, *infra* pp. 26-39) and its order on "reconsideration" issued

June 26, 1970 (Appendix B, *infra* pp. 40-42) are reported at 43 F.P.C. 626 and 43 F.P.C. 950, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on October 14, 1971 (Appendix A, *infra* pp. 24-25). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825l(b).

STATUTE INVOLVED

The pertinent provisions of Section 205(e) and Section 313(b) of the Federal Power Act, 49 Stat. 457, as amended, 16 U.S.C. 824a are set out in Appendix C, *infra* pp. 43-44.

QUESTION PRESENTED

Whether the courts of appeals have jurisdiction under Section 313(b) of the Federal Power Act to review for abuse of discretion actions of the Federal Power Commission concerning the suspension of rate increases under Section 205 (e) of the Act, proposed by public utilities for their sales of electric energy and power subject to regulation under that Act.[1]

STATEMENT

Petitioners, the Municipal Light Boards of the Towns of Reading and Wakefield, Massachusetts, own and operate municipal electric distribution systems and purchase their total power supply from the Boston Edison Company (Edi-

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[1] Should certiorari be granted, Petitioners intend also to present argument on the further question of whether the Commission's suspension of Edison's rate filing for only one day, rather than the five-month period provided in Section 205(e) of the Power Act, should be set aside as discriminatory and an abuse of discretion.

son). Wakefield serves all of the electric needs within its community; Reading, in addition to servicing local needs, provides service in three nearby towns and competes with Edison for desirable large customers.

Edison is an electric utility company serving a compact area in and about the City of Boston, Massachusetts and located wholly within Massachusetts. In addition to its substantial retail business, Edison is a "public utility" subject to Federal Power Commission (Commission) regulation under the Federal Power Act (16 U.S.C. 824a). Some 8.2% ($15.8 million) of its revenues are from sales for resale in interstate commerce subject to the Commission's jurisdiction. These sales are made to 7 all-requirements customers (2 investor-owned and 5 municipal distributors) distributing electricity at retail in areas surrounded by or adjoining areas Edison serves at retail.

On January 29, 1970, Edison tendered for filing with the Commission an increase of approximately 20% or some $2.7 million in the rates charged six of its wholesale customers (including Petitioners) (R. 1-46).[2] Under that filing, the rate to both Petitioners was to be increased by approximately $750,000 per year. The tender also proposed several major changes in the terms and conditions under which the power was to be sold. Since Edison's tender was not completed until March 30, 1970, Edison requested that the rate increase be made effective 30 days thereafter, i.e., on April 30, 1970.

In addition to moving on February 24, 1970 for rejection of the filing (R. 47-87), Petitioners, on February 26, 1970, requested that in the event the Commission declined so to reject, it should suspend the proposed rate change for the full 5-month period as provided in Section 205(e), in accordance with the Commission's long-established practice

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[2] "R" references are to the printed appendix filed with the Court below.

(R. 88-95).[3] In this connection, it was pointed out that such suspension would not affect Edison adversely since "[t]he Commission's latest statistics show Edison to have earned an 8.10% rate of return in 1968, up from a corresponding 1967 level of 7.93%" (R. 89) and such return "is higher by far than the Commission has ever allowed to an electric utility and is obviously excessive" (R. 91).

Following the filing of Edison's answer on March 6, 1970 (R. 96-112), the Commission, on April 29, 1970, issued its order in which it denied Petitioners' motion to reject and directed that Edison's rate filing be suspended for only one day, after which it was to go into effect subject to investigation and refund (Appendix B, pp. 26-36). In its order, the Commission summarized briefly Edison's contentions in support of the filing and Petitioners' objections thereto and then without indicating any view either way on the merits of these contentions, the Commission concluded (Appendix B, p. 29; see also Appendix B, p. 35):

> "Edison's contentions in support of its filing and the protest of its customers raise questions which can best be resolved through a public hearing. Thus, we are ordering a hearing to resolve those questions and we shall suspend for one day the rate schedule filing in Docket No. E-7533 in accordance with Section 205(d) [sic] of the Federal Power Act."

Commissioner Carver dissented from this Commission action (Appendix B, pp. 38-39) objecting to

> "* * * the discriminatory treatment reflected in the unexplained determination that the annual rate increase exceeding $2,733,000 be suspended for one day only.

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[3] Among the grounds urged in support of the motion to reject and reiterated in support of the request for 5-month suspension was that the proposed increase would raise the rates to Petitioners to a level near or above Edison's industrial retail rate, which, being unchanged by the instant filing, would expose Petitioners to the loss of potential industrial business during the period that such new wholesale rate was effective, albeit subject to refund (R. 51-52).

> "The proceedings originate in a unilateral filing of a new wholesale rate schedule which will result in an average increase of more than 20% to six of Boston Edison's seven customers. Five of these are municipally operated distribution systems. In no recent case of similar magnitude has this Commission failed to impose the full five month suspension period permitted by Section 205(e) of the Federal Power Act.
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> * * * * * *
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> "* * * Any 'irretrievable loss' that might result from suspension for five months should be put in realistic perspective. Over the maximum suspension period, the increase sought by Boston Edison represents about six-tenths of one per cent of its total annual revenues from the sale of electricity. By contrast, the interim cost increase to its five municipal customers would exceed 5.5% of their total annual electric utility operating income. Any risk of uncertainty would thus work much harsher consequences upon the customer than the rate increase applicant."

Thereafter, on May 8, 1970, Petitioners, together with the Towns of Concord, Norwood and Wellesley, Massachusetts, which also purchased their power requirements from Edison, requested that the increase be suspended until at least July 1, 1970 in order to give them time to pass on the increase to their customers under local law (R. 194-208). Noting that the cost of power accounted for approximately 55% of their total electric revenues, the Towns pointed out that the Commission's refusal to suspend the 20% rate increase for the full statutory period in accordance with its long-established practice in major rate increase cases placed them in a position of operating at a deficit or substantial loss until their rates could effectively be increased (R. 197-199). In contrast, the Towns noted, Commission statistics showed Edison as having an overall rate of return of 8.1% in 1968 and 8.5% in 1969, with earnings rising even more in 1970 (R. 200-201).

Following the submission of an answer by Edison in which it took issue with the Towns' contentions (R. 209-223), the Commission denied the Towns' motion (R. 224-227). On the one hand, the Commission asserted that Edison's obligation to refund any portion of the rates which eventually are found to have been illegally exacted, afforded adequate protection to the Towns (R. 225). On the other hand, the Commission, in complete disregard of the Towns' claim that Edison was already receiving an 8.5% rate of return, claimed that "any relaxation of our one day suspension period will result in an irretrievable loss to Edison." (R. 225). Commissioner Carver again dissented (R. 227).

Upon the Commission's denial of Petitioners' application for rehearing (R. 228-247, Appendix B, pp. 40-42) (which the Commission undertook to treat as a motion for reconsideration on the theory that its April 29, 1970 order was an interlocutory procedural order (Appendix B, p. 40), Petitioners filed their petition for review in the Court below. In that court, Petitioners urged, as they had in their application for rehearing, that the Commission's failure to suspend Edison's rate filing for the full five-month period provided in Section 205(e) should be set aside as discriminatory and an abuse of discretion in light of the language and history of Section 205(e) and the Commission's own consistent administrative practice of suspending major rate filings for the full statutory period in the absence of exceptional circumstances.[4] Further, they pointed out that refunds were inadequate to provide the protection against excessive rates contemplated by the Federal Power Act and further that the utility's loss of increased revenues during the five-

[4] See, e.g., *Yucca Petroleum Co.*, 29 F.P.C. 211, 212 (1963):

> "In our view, a lesser suspension period than the five month suspension period permitted under Section 4(e) of the Natural Gas Act should not be authorized except in those instances when strong equitable considerations dictate that a shortened suspension period is warranted. * * *"

month suspension period was expressly contemplated by Congress. However, without reaching the merits of these contentions, the Court below held that the Commission's action was exempt from judicial review as a nonreviewable exercise of discretion (Appendix A, pp. 11-18).

REASONS FOR GRANTING THE WRIT

1. The holding of the Court below that the Commission's refusal to suspend Edison's new rates for more than one day were not subject to judicial review, even though discriminatory and involving gross abuse of discretion, conflicts with the holding of the Tenth Circuit in *Phillips Petroleum Co. v. F.P.C.*, 227 F.2d 470 (10th Cir. 1955), *cert.* denied, *sub nom. Michigan Wisconsin Pipe Line Co. v. Phillips Petroleum Co.*, 350 U.S. 1005 (1956) and with the implicit ruling of the Fifth Circuit in *Hunt Oil Co. v. F.P.C.*, 398 F.2d 746 (5th Cir. 1968). In *Phillips*, the Tenth Circuit ruled that a Commission order suspending a rate filing was subject to review generally under Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b),[5] and in *Hunt Oil* the Fifth Circuit implicitly assumed such jurisdiction by passing on Hunt Oil's various complaints going to the merits of the Commission suspension order.[6]

Review of the ruling of the Court below is required not only because of this conflict but also because that ruling is

[5]Section 19(b)'s provisions for judicial review are based on, and constitute virtually a carbon copy of, those in Section 313(b) of the Power Act, Appendix C, *infra*, p. 44.

[6]The recent decision in *The Associated Press v. F.C.C.*, D.C. Cir. No. 23833 (decided July 12, 1971) (App. A, p. 18) does not enhance the soundness of its ruling here. Not only was reviewability of FCC action vis-a-vis suspension not there in issue (see slip opinion, p. 17), but, as was there pointed out in the concurring opinion of Judge McKinnon (slip opinion p. 25) such a holding with respect to an order under Section 402(a) of the Federal Communications Act (47 U.S.C. 402(a)) may itself be at odds with that Court's own recent decision in *United Telegraph Workers AFL-CIO v. F.C.C.*, 436 F.2d 920 (D.C. Cir. 1970).

unsound and, if not reversed, may have important and extensive legal and practical consequences. The Court below is located in the District of Columbia along with many federal agencies and Congress has vested venue to review most administrative actions in that Court; as a result, that Court's decisions on administrative questions have been accorded more than the usual deference. Consequently, since the ruling of the Court below is at odds with the strong presumption of reviewability of agency action (see *infra* pp. 9-11), that ruling, if not reversed, would sharply undermine among the other federal courts the present hospitable atmosphere in favor of such reviewability being fostered by this Court. See, e.g., *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), and cases there cited.

Moreover, because of the unique position of the Court below, a disproportionately large percentage of the administrative review proceedings are instituted in that Court. Indeed, there are even now pending there additional proceedings attacking Commission actions with regard to suspension of proposed new rates which might be affected by the decision herein. See, e.g., *Public Service Commission of the State of New York v. F.P.C.*, D.C. Cir. No. 71-1298;[7] *City of Anaheim, California v. F.P.C.*, D.C. Cir. No. 71-1652; *Borough of Kutztown, Penna. v. F.P.C.*, D.C.Cir. No. 71-1700; *Borough of Middletown, Lewisberry and Goldsboro, Pa. v. F.P.C.*, D.C.Cir. No. 71-1714. In these circumstances, the decision below would permit a gap in the complete bond of protection contemplated by the Federal Power Act (see *infra* pp. 12-13) and thereby create a substantial risk of frustrating the Act's objective of protecting the consumers from excessive rates at all times, including parti-

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[7] The *New York Public Service Commission* case involves a petition for a review of Power Commission Order No. 423, issued February 18, 1971, purportedly establishing a policy under which rate changes filed by independent producers of natural gas would as a general matter be suspended for only one day, without regard to the presence *vel non* of special circumstances.

cularly the five months' suspension period provided in Section 205(e) for new rate filings.

2. The refusal by the Court below to review the Commission's denial of suspension for more than one day flaunts the strong presumption in favor of reviewability of administrative action generally. Only recently in *Abbott Laboratories v. Gardner, supra*,[8] this Court pointed out (at p. 140) that the question whether administrative action is reviewable should be

> "phrased in terms of 'prohibition' rather than 'authorization because a survey of our cases shows that judical review of a final agency action by an aggreived person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."

Far from there being "persuasive reason" for cutting off review here, all indications here support the propriety of such review. In addition to constituting "final agency action for which there is no other adequate remedy in a court" within the review provisions of the Administrative Procedure Act, 5 U.S.C. 704, the situation here involved falls squarely within the class of administrative actions as to which Section 313(b) of the Federal Power Act (Appendix C, *infra* p. 44) expressly contemplates review.

By refusing to suspend Edison's proposed rates for the full five-month statutory period as urged by Petitioners, the Commission has in effect determined that during that period, Edison should charge not its pre-filing rates but rather its proposed new rates, albeit subject to refund. Moreover, such Commission determination is obviously final on the matters as to Edison's appropriate rates during that five-month period since it would be unaffected by the subsequent pro-

[8] In addition to the cases cited in *Abbott Laboratories*, (*supra* at 140, 141), see *Barlow v. Collins*, 397 U.S. 159, 165-166 (1970) (majority opinion), 173-175 (Brennan, J concurring in the result and dissenting); *Environmental Defense Fund, Inc. (EFD) v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970).

ceedings before the Commission. Since the Commission's order thus undertakes finally to determine legal rights with respect at least to the continued applicability of the pre-filing rates during the suspension period, it patently satisfies the review provisions of Section 313(b). See *Phillips, supra* at 474 and cases there cited; *Cities Service Gas Co. v. F.P.C.*, 255 F.2d 860, 862-863 (10th Cir. 1958); *EFD v. Hardin, supra* at 1098, fn. 22 and cases there cited.[9] And since no other way is open to obtain review of this Commission order, it is also reviewable under 5 U.S.C. 704.

3. Nor is the reviewability of the Commission's action undercut by the discretionary nature of the suspension authority vested in the Commission by Section 205(e) of the Federal Power Act, Appendix C, *infra*, p. 43-44. Not only does the Administrative Procedure Act in 5 U.S.C. 706 expressly provide that the Courts may set aside, and thereby have jurisdiction to review, agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise

[9]The suggestion by the Court below (App. A, p. 16), that Petitioners benefited from the Commission's one-day suspension, is based on the invalid premise that a Commission decision not to suspend a rate filing would have been "a plainly nonreviewable exercise of discretion." Not only do the ICC cases relied on by the Court in this connection fall far short of supporting this proposition, (see *infra* pp. 15-16) but the Court's premise is at odds with its own recognition that looking behind form to substance, a denial of suspension is subject to review since it "results in a final disposition of such rights as petitioners and the public may have in interim relief." *EFD v. Hardin, supra* at p. 1099.

The attempt by the Court below to distinguish the denial of suspension held to be reviewable in the *Hardin* case as being "similar in name only to the suspension powers of rate-making agencies" (App. A, p. 17, fn. 23) overlooks (1) this Court's repudiation of the negative order doctrine (see, e.g., *Rochester Telephone Corp. v. United States*, 307 U.S. 125 (1939)), and (2) the cases cited in *Hardin*, at fns. 22, 29 and 30, which, it should be noted, include review of denial of suspension by rate-making agencies. See, e.g., *Isbrandtsen Co. v. United States*, 211 F.2d 51 (D.C. Cir. 1954), *cert.* denied, *sub nom. Japan-Atlantic and Gulf Conference v. United States*, 347 U.S. 990 (1954).

not in accordance with law," but its legislative history manifests

> "* * * a congressional intention that it cover a broad spectrum of administrative actions [fn. omitted] and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospital' interpretation." (*Abbott Laboratories v. Gardner, supra* at pp. 140-141 and cases there cited; *Barlow v. Collins, supra* at 174-175 (Brennan, J. concurring in the result and dissenting).

Viewed in this context, it is apparent that the holding below that the Commission's one-day suspension is not subject to judicial review" (App. A, p. 17) suffers from the " 'all or none fallacy' which ignores the language and intent of [the] provision * * * [A]ssertions of discretion inevitably raise questions of degree which must be appraised in the context of the relevant provisions of law and the nature of the particular action sought to be reviewed." *Medical Committee for Human Rights v. S.E.C.*, 432 F.2d.659, 673 (D.C. Cir. 1970) pending on writ of certiorari, No. 70-61. Indeed, most statutory delegations to administrative agencies include broad areas of discretion and far from being unbounded, most exercises of such discretion are subject to review for errors of law including, traditionally, abuse of discretion. *Medical Committee for Human Rights v. S.E.C., supra* at 673; Cf *F.P.C. v. Idaho Power Co.*, 344 U.S. 17 (1952); *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

That the Commission's authority with regard to suspension was intended to be limited and, as such, subject to judicial review is apparent from the language and intent of suspension provision in Section 205(e), Appendix C, *infra*, pp. 43-44. That Section provides in pertinent part that pending the Commission hearing and decision on the lawfulness of new rate schedules,

> "* * * the Commission * * * may suspend the operation of such schedule and defer the use of such rate * * *, but not for a longer period than five

> months beyond the time when it would otherwise go into effect; * * * If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate * * * shall go into effect at the end of such period, * * *"

The above language, particularly the last sentence, clearly envisions that other than in exceptional cases, new rates are to be suspended for the full five-month period provided unless the case is decided earlier.[10]

This reading is supported by the legislative history of the suspension provisions contained in Section 15(7) of the Interstate Commerce Act (47 U.S.C. 15(7)) from which Section 205(e) was derived (see *Hope Natural Gas Co. v. F.P.C.*, 196 F.2d 803, 806-807 (4th Cir. 1952). As summarized in *Arrow Transportation Co. v. Southern Railway Co.*, 372 U.S. 658, 664-666 (1963), Section 15(7)'s present suspension provisions were developed as a compromise between between the interests of the public in deferring the effectiveness of rate increases pending determination of the lawfulness and the carriers' fears that unlimited suspension would deprive them of needed rate increases without opportunity for subsequent recoupment. In other words, "Congress intended to protect consumers from increased rates until the Commission would fix just and reasonable rates but it considered that a period of five months would be the maximum time permitted." *Hunt Oil Co. v. F.P.C.*, *supra*, at 750; see also *Hope Natural Gas Co. v. F.P.C.*, *supra* pp. 806-808; *Phillips Petroleum Co. v. F.P.C.*, *supra* at p. 474.

Since the Commission's refusal to suspend Edison's rate increase for more than one day operates to require Petitioners to pay higher rates during that five-month period than would otherwise be in effect if these new rates had been suspended and since refunds are inadequate to provide the requisite protection (see *F.P.C. v. Tennessee Gas Trans-*

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[10]The fact that "may" is used in describing the Commission's suspension authority does not negate reviewability. *Barlow v. Collins*, *supra* at 165-166; *EFD, Inc. v. Hardin*, *supra* at 1098.

mission Co., 371 U.S. 145 (1962); *F.P.C. v. Hunt*, 376 U.S. 515 (1964), it is apparent that the Court of Appeals' holding that the decisions with regard to suspension are committed wholly to the Commission's discretion creates the risk of frustrating the Federal Power Act's objective "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges" at all times. See, e.g., *Hunt Oil Co. v. F.P.C.*, *supra* at 750; *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378, 388 (1959); *Sunray Mid-Continent Oil Co. v. F.P.C.*, 364 U.S. 137, 147-(1960).

4. The contrary holding of the Court below is based on a misreading of this Court's decision in the *Arrow Transportation Co.* case, *supra*. In addition to this Court's express *caveat* there that its holding does not necessarily extend to the suspension provisions contained in other federal regulatory statutes, including Section 205(e) of the Power Act here involved (372 U.S. at 666, fn. 13), the question in *Arrow* related to the jurisdiction of the district courts to suspend by injunction the effectiveness of the proposed rate change beyond the statutory period in a proceeding still pending undecided before the ICC (372 U.S. at 659-662).

The Court's holding that the district court lacked *original* jurisdiction so as to extend the suspension period patently does not control, much less decide, the question here involved as to the jurisdiction of the courts under the usual judicial review provisions to *review* for abuse of discretion an agency refusal to suspend a proposed rate for the full period authorized in the controlling statute. In other words, *Arrow's* holding that the ICC there involved had "sole and exclusive power to suspend" (372 U.S. at 667) is not, as the Court below would have it, necessarily synonymous with "unreviewable." Compare *United States v. California Eastern Lines, Inc.*, 348 U.S. 351 (1955), reversing, 211 F.2d 635 (D.C. Cir. 1954).

Accordingly, the fact that the original jurisdiction with regard to suspension is vested in the administrative agency to the exclusion of the Courts does not mean that the Courts are also ousted of their jurisdiction to review under the pertinent provisions of the statute involved. Indeed, this Court in *Arrow* expressly pointed out that its holding that the courts lacked jurisdiction to extend the suspension of new rates beyond the statutory period was necessary to maintain the integrity of the judicial review provisions of the Interstate Commerce Act. See 372 U.S. at 671 and fn. 22.

That *Arrow* does not foreclose judicial review of Power Commission actions with regard to the suspension of rates as provided in Section 205(e) of the Federal Power Act is further emphasized by the reliance in *Arrow* upon the "close nexus between the suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates." (372 U.S. at 668). In the Court's view, for the courts to have original jurisdiction to suspend "would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable" (372 U.S. at 669-670).

However, while it is well established, as the Court went on to note that "such consideration would create the hazard of forbidden judicial intrustion into the administrative domain" (*Id.* at 670), is is also equally well established, as *Arrow* also recognized (*Ibid.*), that the Courts do have jurisdiction, under the typical judicial review provisions, to *review* agency determinations of just and reasonable rates for errors of law. By the same token, the fact that the agencies have exclusive original jurisdiction to suspend new rate filings, does not stand in the way of the courts nonetheless having jurisdiction to review such agency determinations.

5. Finally, the various ICC cases cited by the Court below (App. A, pp. 14-16) do not provide the support envisioned by that Court. Once it is recognized that *Arrow* does not

resolve the apparent conflict among these ICC cases, it is obvious that that conflict still survives and there is a substantial body of cases headed by *Amarillo-Borger Express, Inc. v. United States*, 138 F.Supp. 411 (N.D. Texas 1956), vacated as moot, 362 U.S. 1028 (1957), which, if applicable here, support the reviewability of the Power Commission's action.

As to the cases apparently holding the contrary, cases such as *Oscar Mayer & Co. v. United States*, 268 F.Supp. 977, 980 (W.D. Wisc. 1967) (three judge court); *National Industrial Traffic League v. United States*, 287 F.Supp. 129, 131 (D.D.C. 1968) (three judge court), aff'd, 393 U.S. 535 (1969), also rely on the ground that the plaintiff had omitted to invoke an available alternative remedy and therefore had failed to exhaust his administrative remedies. Here, in contrast, there is no such alternative available to Petitioners and the withholding of review would be inconsistent with the express mandate of the Administrative Procedure Act, 5 U.S.C. 704. See *supra*, p. 10.

In addition, the apparent disagreement by Judge Swan with *Amarillo-Borger* – as set out in *Freeport Sulphur Co. v. United States*, 199 F.Supp. 913 (S.D.N.Y. 1961) (three judge court) and in his dissent in *Long Island R.R. v. United States*, 140 F.Supp. 823, 829-831 (E.D.N.Y. 1956) (three judge court) quoted by the Court below (App. A, p. 15) – relates not to the question of reviewability *vel non* of ICC suspension actions, but rather to the standards to be applied in passing on such agency actions.[11] On the question of reviewability *per se*, Judge Swann expressly stated in his *Long Island* dissenting opinion (140 F.Supp. at 830):

> "Concededly refusing or granting suspension of rates and the vacating of a prior order of suspension are matters entrusted to the discretion of the Commission, and its action is immune to court review

[11] I.e., whether or not the agency must set forth reasons in declining to suspend.

> *unless it has abused its discretion.* The decisions establishing this rule long antedate enactment of the Administrative Procedure Act. I find nothing in the legislative history of that Act to indicate Congressional intent to change the law in this respect * * * ." (Emphasis supplied.)

See also *Freeport Sulphur Co. v. United States*, *supra* at p. 916.

Finally, while, as the Court below asserts (App. A, p. 15), Judge Friendly's opinion in *Long Island R.R. Co. v. United States*, 193 F.Supp. 795, 800 (E.D.N.Y. 1961) (three judge court) appears to negate review of agency suspension action for abuse of discretion, such a reading is at odds with his subsequent observation in *Wong Wing Hang v. INS*, 360 F.2d 715, 718 (2d Cir. 1966) that "only in the rare (some say non-existent) case where discretion [of the usual sort] has been vested, may review for 'abuse' be precluded." Indeed, the three judge court in *Naph-Sol Refining Co. v. United States*, 269 F.Supp. 530 (W.D. Mich. 1967) (App. A, p. 15, fn. 20, p. 16, fn. 21), while expressing agreement with Judge Friendly's *Long Island R.R.* opinion, also ruled as if to correct an oversight (269 F.Supp. 532):

> "This Court is also of the opinion that upon presentation of a prima facie case of 'gross abuse' of discretion on the part of the Commission there would be a power to review. We are satisfied in this case that there was no 'gross abuse' of authority, the Commission acted within its statutory authority and did not violate 'a clear statutory command'."[12]

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[12] Similarly, of the cases cited by the Court below as holding denial of suspension to be nonreviewable (App. A, p. 16, fn. 21), (1) *Luckenbach Steamship Co. v. United States*, 179 F.Supp. 605, (D. Del. 1959) (three judge court), vacated as moot, 364 U.S. 280 (1960) and *Bison Stemship Corp. v. United States*, 182 F.Supp. 63 (N.D. Ohio, 1960) (three judge court), are based on the reasoning, since rejected (see *supra* p. 10), that such a refusal to suspend is merely "an interlocutory step preceding a hearing and decision as to the lawfulness of the proposed rates" (see 179 F.Supp. at 610) (see also *supra* p.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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January, 1972

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11); and (2) *Movers' and Warehouse Owners Ass'n v. United States*, 227 F.Supp. 249 (D.D.C. 1964) (three judge court) misreads the *Arrow* case.

APPENDIX A

1. OPINION OF COURT OF APPEALS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,450

MUNICIPAL LIGHT BOARDS OF READING AND WAKEFIELD, MASSACHUSETTS, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

BOSTON EDISON COMPANY, INTERVENOR

Petition for Review of an Order of the Federal Power Commission

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Decided October 14, 1971

Mr. George Spiegel, with whom *Mr. James F. Fairman, Jr.*, was on the brief, for petitioners.

Mr. Peter H. Schiff, Solicitor, Federal Power Commission at the time of oral argument, with whom *Messrs. Gordon Gooch*, General Counsel, *Leonard D. Eesley*, Assistant General Counsel, *Miss Sandra J. Strebel* and *David F. Stover*, Attorneys, Federal Power Commission, were on the brief, for respondent.

Mr. Thomas M. Debevoise, with whom *Mr. George F. Bruder* was on the brief, for intervenor.

Mr. Richard A. Solomon filed a brief on behalf of Boston Gas Company as *amicus curiae*.

Mr. Charles F. Wheatley, Jr., and *Mrs. Grace Powers Monaco* filed a brief on behalf of the Towns of Concord, Norwood and Wellesley, Massachusetts, as *amici curiae*.

Before BAZELON, *Chief Judge*, FAHY, *Senior Circuit Judge*, and LEVENTHAL, *Circuit Judge*.

LEVENTHAL, *Circuit Judge*: This case involves a challenge to the preliminary treatment accorded by the Federal Power Commission to a rate increase filing by Boston Edison Company ("Edison"). The petition to review the Commission's order has been filed by the Municipal Light Boards of Reading and Wakefield, Massachusetts ("Towns"), which own and operate municipal electrical distribution systems and purchase their total power supply from Edison, their wholesale supplier.

I. FACTS AND PRIOR HISTORY

On January 29, 1970, Boston Edison submitted for filing to the FPC a rate schedule, intended to supersede the company's existing rate schedule, which proposed an increase of rates, yielding an addition of some $2.7 million annually, and also making changes in the terms of service.

On February 24, 1970, the Towns filed a motion to reject the Edison filing contending (a) that it contained provisions in the terms of service prima facie contrary to national antitrust policy, and (b) that the filing failed to provide the required functional classifications both as to accumulated depreciation and current depreciation expense. Two days later the Towns sent a letter to the FPC which referred to its contentions and added other alleged deficiencies in the filing, and which urged that if the rate filing were not rejected it be suspended for the maximum

five month period permitted by the Federal Power Act and made the subject of an investigation and hearing.

On April 22, 1970, following Edison's answer to the motion to reject, the Towns filed another motion to reject the filing on the ground that Edison was failing to provide a utility grade of service.[1]

On April 29, 1970, the FPC issued an order which denied the Towns' motions to reject, suspended the Edison filing for one day after which it was to go into effect subject to refund, and set the various issues presented for a hearing. Commissioner Carver dissented from the decision to suspend the filing for only one day.

On May 8, 1970, the Towns filed a Motion for Emergency Amendment of Order requesting an interim postponement of the effective date of rate increase in order to give them time, under local law, to properly redesignate their retail rates so as to pass on the increases to their retail consumers. Boston Gas Co., another wholesale customer of Edison, intervened on May 12, 1970, and moved for an emergency amendment of the April 29 order on the ground that the FPC's Rules require that a utility complete its documentary submission 60 days before the changed rate becomes effective and that the FPC had found in its April 29 Order that Edison had not completed its filing until March 30, 1970. On May 26, 1970, the FPC denied the motions.

The Towns' application for rehearing was denied by order of June 26, 1970. A separate order issued the same day required consideration in the rate proceeding of the service inadequacies alleged by the Towns and their effect on the proper rate for the service rendered.

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[1] This alleged frequent and substantial system-wide voltage reductions and Edison's warnings of anticipated service interruption and limitations during the peak summer months.

II. Issues Relating To Rejection of Rate Increase Filing

The Towns' claim that the changed terms of service violated national antitrust policy has been mooted.[2] The issue before us is whether the FPC was required to reject the filing because of alleged (a) inadequacies of Edison's prior service, a contention that has generated a dispute as to facts as well as standards, and (b) failure to comply with rules requiring functional classification for accumulated depreciation and depreciation expense, a claim that will be considered further in due course.

We begin our consideration with some general reflections concerning the significance in administrative law terms of an agency's "rejection" of a filing. The FPC's regulations under the Federal Power Act provide that the Commission's Secretary shall reject any filing "which patently fails to substantially comply" with applicable requirements of the Commission's regulations and rules of practice.[3]

There is a sound use, and indeed requirement, of an agency "rejection" of a party's filing. But it should

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[2] Counsel for the Towns filed a memorandum on June 8, 1971, in response to our request at oral argument, advising that this issue was mooted by a settlement reached by the parties to this proceeding which was entered into the record (Federal Power Commission; Docket E-7400 *et al.*) at hearing on March 16, 1971, and approved by Order of the FPC issued June 2, 1971.

[3] 18 C.F.R. § 35.5:

> "The Secretary, pursuant to the Commission's rules of practice and procedure and delegation of Commission authority, shall reject any material submitted for filing with the Commission which patently fails to substantially comply with the applicable requirements set forth in this part, or the Commission's rules of practice and procedure."

mark the clear case of a filing that patently is either deficient in form or a substantive nullity.

The general thrust of the Administrative Procedure Act is the requirement of a proceeding for the presentation of conflicting contentions for resolution by the agency.[4] There are occasions when an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of fact is involved, but only a question of law or administrative policy of such a nature that there is neither a dispute as to material facts nor a need to ventilate the underlying facts to aid in policy determination. *Citizens for Allegan County, Inc.* v. *F.P.C.*, 134 U.S.App.D.C. 229, 414 F.2d 1125 (1969). These matters present to the agency a procedure that may readily be likened to the motion for summary judgment contemplated by Rule 56 of the Federal Rules of Civil Procedure.

A "rejection" of a filing, in contrast, is more like a motion to dismiss on the face of the pleading, and indeed goes even beyond that. It is appropriate where the filing is so deficient on its fact that the agency may properly return it to the filing party without even awaiting a responsive filing by any other party in interest.

It is "a peremptory form of response to filed tariffs" which classically is used not to dispose of a matter on the merits but rather as a technique for calling on the filing party to put its papers in proper form and order.[5]

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[4] Sections 4 and 5, 5 U.S.C. §§ 553, 554 (Supp. V, 1970).

[5] F. WELCH, CASES AND TEXT ON PUBLIC UTILITY REGULATION 581 (1961). "A 'notice of rejection' is not generally used to dispose of a case on its merits. It is more in the nature of a procedural or interim pleading or response, giving the utility an opportunity to correct some defect in its original filings, or to file new schedules or tariffs in proper order, if it so desires." *Id.*

Its use is not limited to defects of form. It may be used by an agency where the filing is so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket. The pertinent considerations may go beyond mere administrative choice in docketing techniques, as appears from the statutes governing rate filings, where a filing once lodged is permitted to go into effect, either at once, if not suspended, or at any rate after a suspension period subject to a time limit. In these situations a rate filing may be rejected both when the governing statute explicitly provides for rejection[6] and when it does not. The Commission had the authority to issue a regulation like 18 C.F.R. § 35.5 (*supra* note 3) for the rejection of filings that patently fail to establish substantial compliance with duly issued regulations.

This rests on its basic statutory authority to issue regulations "necessary or appropriate to carry out the provisions of the Act."[7] This authority is "not restricted to procedural minutiae" and provides latitude for administration in furtherance of Congressional purposes,[8] including this "rejection" regulation. Thus in *Federal Power Commission* v. *Texaco, Inc.*, 377 U.S. 33 (1964), the Court upheld the rejection without hearing of an application for a certificate of convenience and necessity to supply gas to a pipeline, when the application was supported by a

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[6] W. J. Dillner Transfer Co. v. United States and ICC, 214 F. Supp. 941 (W.D.Pa., 3-judge court, 1963) (tariff named rates for interstate transportation of certain commodities for which the motor carrier held no operating authority).

[7] Section 309 of the Federal Power Act, 16 U.S.C. § 825h (1964).

[8] Niagara Mohawk Power Corp. v. F.P.C., 126 U.S.App.D.C. 376, 383, 379 F2d 153, 160 (1967).

contract containing an "indefinite escalation" pricing clause and outstanding regulations provided that such clauses would result in summary rejection. The Court upheld the summary rejection as avoiding a "vast proliferation of hearings."[9]

In *United Gas Pipe Line Co.* v. *Mobile Gas Service Co.*, 350 U.S. 332 (1956) the Court held that the FPC erred in failing to exercise its authority to reject a rate filing that was a nullity, because the natural gas company had sought unilaterally to change a rate set by contract, and in issuing an order "permitting" the new rates to become effective.

These Supreme Court precedents under the Natural Gas Act are plainly applicable to the Federal Power Act, involved in the case at bar.[10] And in the context of their doctrines we take up the issues presented by petitioners.

1. *Issue of Objections to Quality of Service*

Neither the Commission's regulations nor general principles required rejection of Edison's rate filing on the basis of objections to Edison's prior service. Edison disputed as a factual matter the number and duration of voltage reductions set forth in the Towns' Motion and claimed that some of the reductions were not due to problems in its own system but were area-wide in nature. The June 26, 1970, order granted the Towns' motion of

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[9] While the Court also referred to the application as "not in proper form" (377 U.S. at 45), obviously form and substance were interrelated, and even an application that admittedly is filed "in proper form and manner" may be rejected if its content reveals that it is plainly a nullity. See Dillner v. United States, *supra* note 6, 214 F.Supp. at 944.

[10] United Gas Pipeline Co. v. Mobile Gas Service Corp., *supra*, 350 U.S. at 346-47.

April 22 insofar as it requested "an investigation into whether the quality and adequacy of electrical service rendered by Edison to its wholesale customers may affect the lawful rates to be charged for such service," pursuant to the FPC's finding that "It is appropriate that we consider in this proceeding whether interstate rates should be adjusted to reflect these specific alleged service inadequacies to the extent that they relate to Edison's system." The Commission acted properly in providing for a hearing on the issues raised by the Towns' factual allegations. What Edison's filing presents is not a patent nullity but at most a matter that may be resolved against it, in whole or in part, after a hearing and determination of the controverted issues of fact, policy and law.

2. *Issue of Lack of Compliance with Regulations Requiring Functional Classification of Accumulated Depreciation and Depreciation Expense*

The Regulation concerning "Filing of Changes in Rate Schedule," 18 C.F.R. § 35.13, lists fifteen detailed statements that must be submitted with a rate filing, of which two relate to depreciation:

> *Statement E—Accumulated Depreciation.*
>
> A statement of the accumulated provision for depreciation by functional classification as of the beginning and the end of the test period.
>
> . . . . . .
>
> *Statement I—Depreciation Expense.*
>
> For the test period show depreciation expense by functional classification. The annual rates used in computing such expense and the method of determining such depreciation rates should also be shown."[11]

[11] 18 C.F.R. § 35.13(b)(4)(iv). Statements *E* and *I*.

"Functional classification" is defined as "classification as among production, transmission, distribution, and general functions."[11]

Edison's filing did not show accumulated depreciation provisions and depreciation expenses by functional classification. Its Statements F and I contain only one figure, with a note that the figure shown is "[a]pplicable to all depreciable property, no breakdown between various kinds of property has been made on the books of the Company." (R. 753, 765) Nor does Statement I explain the method of determining depreciation rates; the Statement merely sets forth the annual rate used in determining the expense and says, "Such amounts are believed by the management, based on past experience, to be sufficient to meet write offs of the cost of property at the end of its useful life."

The Town argues that these failures to functionalize the depreciation accounts require reversal of the Commission's decision not to reject the filing. We disagree.

Insofar as the issue of rejection *vel non* is concerned, the purpose of the depreciation accounting provisions in § 35.25 of the regulations is to assure that the rate filing will provide the FPC with the necessary information from which it can reach an informed and equitable decision as to the necessity for an investigation, hearing, and suspension, and to permit the Commission and parties in interest with meaningful opportunity to prepare for any proceeding.

These filing rules are different from the regular depreciation rules mandated by the FPC's Uniform System of Accounts. The Uniform System of Accounts is an exercise of the FPC's power under the Act to require public utilities to keep accounts, including depreciation accounts, in

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[11] Id. at Statement *D*, n. 2.

accordance with such rules and regulations as necessary or appropriate for purposes of administration of the Act. *See Appalachian Power Co.* v. *FPC*, 328 F.2d 237, 246-249 (4th Cir. 1964), *cert. denied*, 379 U.S. 829 (1964); *A.T.&T. Co.* v. *United States*, 299 U.S. 232 (1936).

The filing rules at issue here are designed to give the FPC a "first cut" at the material in the filing. They are "mere aids to the exercise of the agency's independent discretion," and in both language and purpose leave room for a doctrine of "substantial" or "reasonable" compliance. *American Farm Lines* v. *Black Hall Freight Service*, 397 U.S. 532, 539 (1970). We cannot say that the FPC was unreasonable in finding the filing sufficiently complete for it to be able to decide whether or not to investigate and suspend the increased rate.[13]

This conclusion is not undercut by the possibility, or indeed probability, that during the investigation and hearing on Edison's filing there will emerge more refined functionalized depreciation figures that differ from the rough amounts derivable for initial purposes from the filing itself.[14] As to the present issue, we think the FPC cannot

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[13] The FPC brief maintains that functionalized depreciation reserves can be computed readily for these purposes by applying to the total depreciation reserves set out in Edison's filing the percentages applicable to the comparable functions of depreciable plant set out as required in Statement D (R. 751-52). To each function of depreciable plant thus derived, functionalized depreciation expense can be calculated by applying 3%, the rate used by Edison in its own depreciation calculations. (Statement I, R. 765; see also the amounts allocated to depreciation in Statement M, "Allocated Costs of Service", R. 782).

[14] As a result of an earlier compliance audit by the FPC accounting staff, Edison in 1968 engaged an economic consulting firm to conduct a complete analysis of its plant in order to establish separate depreciation accounts for the basic

be held to be unreasonable in its failure to reject the entire filing ab initio, even though the utility did not comply rigorously with the letter of the filing regulations.

III. Reviewability of One-Day Suspension of Filing

The Federal Power Act provides that any rate or charge made, demanded or received by any public utility for electric energy "that is not just and reasonable is hereby declared to be unlawful."[15] Its primary aim is the protection of consumers from excessive rates and charges. *See Atlantic Refining Co. v. Public Service Comm'n*, 360 U.S. 378, 388-89 (1959); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610-12 (1944). To effectuate this purpose, the FPC is empowered, either upon complaint or on its own initiative, to enter upon an investigation concerning the lawfulness of a rate in a newly filed schedule.[16] Section 205(e), 16 U.S.C. 824d(e) further provides a suspension authority:

> [P]ending such hearing and decision thereon the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect . . . .

If the proceeding has not been concluded at the expiration of the suspension period, the newly filed rate goes into effect, but the FPC has the authority to order refunds, with interest, of such portions of increased charges or rates as it ultimately decides are not justified.

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functional classes of plant. This study was completed and will be before the FPC in the rate proceeding.

[15] Federal Power Act § 205(a), 16 U.S.C. 824d(a) (1964).

[16] Federal Power Act § 205(e), 16 U.S.C. 824d(e) (1964).

This statutory structure "not only gives the [utility] opportunity to increase its rates where justified but likewise guarantees that the consumer may recover refunds for moneys paid under excessive increases." *Atlantic Refining Co.* v. *Public Service Comm'n, supra*, 360 U.S. at 389. *See also Hope Natural Gas Co.* v. *FPC*, 196 F.2d 803, 806-07 (4th Cir. 1952).

In its Order of April 29, 1970, the FPC found that "The proposed increased rates and charges contained in [Edison's] Rate S-1 have not been shown to be justified and may be unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful under the Federal Power Act." Thus it set the matter for investigation and hearing. To preserve its power under the Act to order refunds, it ordered a suspension,[17] but the suspension's duration was only for one day. The claim put to us by the Towns is essentially the position taken in dissent by Commissioner Carver, who stated that the one day suspension was a departure from prior FPC practice of suspending major rate increases for the full five months allowed by the Act, and added:

> "Any 'irretrievable loss' that might result from suspension for five months should be put in realistic perspective. Over the maximum suspension period, the increase sought by Boston Edison represents about six-tenths of one per cent of its total annual revenues from the sale of electricity. By contrast, the interim cost increase to its five municipal customers would exceed 5.5% of their total annual electric utility operating income. Any risk of uncertainty would thus work much harsher consequences upon the customer than the rate increase applicant."

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[17] See Mobile Gas Service Corp., 12 FPC 1422, 1424 (1953), *rev'd on other grounds sub nom.* Mobile Gas Service Corp. v. F.P.C., 215 F.2d 883 (3d Cir. 1954), *aff'd sub nom.* United Gas Pipeline Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956).

A. *Reviewability of suspension orders.*

The FPC asserts that "the exercise of a federal regulatory agency's *discretion* with respect to suspending a rate change is not reviewable." We are not aware of precedents under the Federal Power Act. The parties rely on cases concerning nearly identical suspension provisions of other rate setting laws.

A leading precedent is *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658 (1963). The Interstate Commerce Commission had there suspended a schedule of reduced railroad rates for the maximum period of seven months authorized by § 15(7) of the Interstate Commerce Act, but had not reached a decision as to the rates' lawfulness by the time the suspension order (and a further voluntary postponement by the railroads) had expired. When competitors sued to enjoin the railroads from making the rate reduction effective pending the ICC's decision, the Supreme Court held that Congress vested in the ICC "the sole and exclusive power to suspend" and withdrew from the judiciary "any pre-existing power to grant injunctive relief." 372 U.S. at 658.

The Court, reasoning in large part from the history of the Interstate Commerce Act,[18] considered that an in-

[18] Before the ICC was given the power to suspend new rates, the courts had disagreed whether they had the power to enjoin rate changes pending ICC determination. Congress's grant of the suspension power to the ICC thus promoted "the regulatory goal of uniformity." 372 U.S. at 664. Furthermore, Congress engaged in a controversy lasting nearly two decades concerning the length of the suspension period, and it gave the ICC power to order refunds where the hearings outlasted the suspension, showing its awareness that some shippers might have to pay unlawful rates for a time. *Id.* at 664-66. Thus the Court reaffirmed its earlier statement in Board of Railroad Comm'rs v. Great Northern Ry. Co., 281 U.S. 412, 429

junctive power in the courts pending ICC consideration would interfere with that Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates.

> ". . . A court's disposition of an application for injunctive relief would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the administrative domain. . . . If an independent appraisal of the reasonableness of rates might be made for the purpose of deciding applications for injunctive relief, Congress would have failed to correct the situation so hazardous to uniformity which prompted its decision to vest the suspension power in the Commission." (372 U.S. at 669-71.)

The Court concluded "that Congress meant to foreclose a judicial power to interfere with the *timing* of rate changes which would be out of harmony with the uniformity of rate *levels* fostered by the doctrine of primary jurisdiction." (*Id.* at 668; emphasis in original).

The Towns say that while the decision whether and for how long a rate filing is to be suspended calls for the exercise of FPC discretion, "the exercise of that discretion is in no sense invulnerable to judicial review." They rely on the line of cases springing from *Amarillo-Borger Express, Inc. v. United States*, 138 F.Supp. 411 (N.D. Tex. 1956) (three-judge court), *vacated as moot*, 352 U.S. 1028 (1957).[39] These cases, all preceding *Arrow Transportation*,

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(1930): "This power of suspension was entrusted to the Commission only." *Id.* at 667.

[39] Long Island Railroad Co. v. United States, 140 F. Supp. 823 (E.D.N.Y. 1956) (three-judge court) followed *Amarillo-Borger* but noted that an initial refusal or grant of suspension is nonreviewable. *See also*, Dixie Carriers, Inc. v. United States, 143 F.Supp. 844 (S.D.Tex. 1956) (three-judge court), *vacated as moot sub. nom.* Atchison, T. & S.F. Ry. Co., 355 U.S. 179 (1957); *cf.* Seatrain Lines, Inc. v. United States, 168 F.

involve the special situation of an order vacating a prior suspension, where the intial order was accompanied by statutorily prescribed reasons but the latter order contains no new findings or only pro forma reasoning.

However, *Freeport Sulphur Co.* v. *United States*, 119 F. Supp. 913 (S.D.N.Y. 1961) (three-judge court) refused to follow the *Amarillo-Borger* line of cases. Judge Swan's opinion echoed his dissenting observation in *Long Island RR* v. *United States*, *supra*, 140 F. Supp. at 830:

> The Statute, 49 U.S.C.A. § 15(7), does not require the Commission to state its reasons when suspension of proposed rates is denied; only when suspension is granted must reasons be stated. Since vacation of a prior suspension order has the effect of a denial of suspension thereafter, it may be doubted whether the vacating order need state reasons.

Compare *Long Island RR Co.* v. *United States*, 193 F.Supp. 795, 800 (E.D.N.Y. 1961) (three-judge court), where Judge Friendly's comprehensive opinion concludes that suits to enjoin suspension orders "may be entertained if, but only if, the complaint shows that the suspension is plainly without statutory authority or violates 'a clear statutory command' and that the complaining party has no other available remedy." Subsequent decisions have denied judicial review to orders vacating prior suspension orders and have explicitly rejected the *Amarillo-Borger* line.[20]

Whether or not the *Amarillo-Borger* line of cases survives *Arrow Transportation*, it is settled that the refusal

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Supp. 819 (S.D.N.Y. 1958) (three-judge court); Atlantic Coast Line RR v. United States, 173 F.Supp. 871 (E.D.Va. 1958) (three-judge court).

[20] Oscar Mayer & Co. v. United States, 268 F.Supp. 977 (W.D.Wisc. 1967) (three-judge court) (decision also based in part on failure to exhaust administrative remedies); Naph-Sol Refining Co. v. United States, 269 F.Supp. 530 (W.D. Mich. 1967) (three-judge court).

to suspend a filed rate is a nonreviewable exercise of agency discretion."

While the point is not absolutely decisive it is material and meaningful that the Towns have been put in a far more advantageous position by the one day suspension than if the FPC had decided, in a plainly nonreviewable exercise of discretion, not to suspend Edison's filing at all. The suspension, and the FPC's findings leading it to order the suspension and hearing, have kept the burden of proof on Edison to justify its proposed rate increase and have

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[11] Luckenbach Steamship Co v. United States, 179 F. Supp. 605, 609-610 (D.Del. 1959), *vacated as moot*, 364 U.S. 280 (1960); National Industrial Traffic League v. United States, 287 F. Supp. 129 (D.D.C. 1968) (three-judge court); Movers' and Warehousemen's Association v. United States, 227 F. Supp. 249 (D.D.C. 1964) (three-judge court); Bison Steamship Corp. v. United States, 182 F. Supp. 63 (N.D. Ohio 1960) (three-judge court); Carlsen v. United States, 107 F. Supp. 398 (S.D.N.Y. 1952) (three-judge court).

The courts have also refused to review orders granting suspension, at least where the order is within the powers delegated to the Commission by statute. *See, e.g.*, Naph-Sol Refining Co. v. United States, *supra* note 20; Great Western Packers Express, Inc. v. United States, 246 F. Supp. 151 (D.Colo. 1965) (three-judge court); Long Island RR Co. v. United States, 193 F. Supp. 795, 798-99 (E.D.N.Y. 1961) (three-judge court).

Professor Davis has concluded that *Arrow Transportation* foreclosures judicial review of suspension orders, K. DAVIS ADMINISTRATIVE LAW TREATISE § 28.16 (Supp. 1970) at 966:

> "One important area of administrative action in which judicial review is unavailable even if the agency acts arbitrarily or in abuse of discretion involves the suspension or refusal to suspend newly filed rates. The determination of whether to suspend or to allow the rates to go into effect is typically committed to the agency. The determination is protected neither by hearing safeguard nor by judicial review."

enabled the FPC to order refunds, with interest, of such portion of the increased rates as the FPC's decision may find not to be justified.[22] While the FPC's refund authority may be inadequate to protect the customer's interests fully, *see FPC v. Hunt*, 376 U.S. 515, 524-25 (1964), the fact that a decision not to suspend is committed by law to the agency's discretion supports the conclusion that the limited suspension order in this case is not subject to judicial review.[23]

Our ruling that the one-day suspension order is not subject to judicial review, either as to the granting of the one-day suspension or the denial of a five-month suspen-

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[22] Federal Power Act § 205(e), 16 U.S.C. 824(e) (1964).

[23] The refusal to suspend held reviewable in Environmental Defense Fund, Inc. v. Hardin, 138 U.S.App.D.C. 391, 428 F.2d 1093 (1970) is similar in name only to the suspension powers of rate-making agencies. Pesticides and other "economic poisons" must be registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 135-135k (1964). Registration under the Act can be suspended to avert an imminent hazard to the public, an interim procedure that expedites the lengthy statutory procedure necessary for full cancellation of registration. We held that administrative inaction—in the form of taking no action on a petition to suspend certain pesticides—was "tantamount to an order denying suspension" and was sufficiently ripe for judicial review "because the Secretary's inaction results in a final disposition of such rights as the petitioners and the public may have to interim relief." 138 U.S.App.D.C. at 397, 428 F.2d at 1099. We required a showing of "clear evidence of legislative intent" to preclude judicial review; permissive statutory language could not, in itself, suffice to show that the action was committed by law to agency discretion. *Id.* at 396, 428 F.2d at 1098. *See also* Medical Committee for Human Rights v. S.E.C., —— U.S.App.D.C. ——, 432 F.2d 659 (1970), *cert. granted*, 401 U.S. 973 (1971). The history of the suspension power of the ICC and the long line of cases holding refusals to suspend filed rates nonreviewable exercises of agency discretion place this case in a clearly different context.

sion, is in accord with this court's recent opinion in *Associated Press* v. *FCC*, ——U.S.App.D.C. ——, —— F.2d —— (No. 23,833, July 12, 1971). Our ruling is in the context of the kind of claim presented to us—that there has been an abuse of agency discretion. We do not speak to a case where the claim is that the suspension action taken or declined by the agency is plainly without any statutory authority or in defiance of a "clear and mandatory" statutory command or reflects an error evident on the face of the papers—considerations which have been held to constitute an exception, a basis for judicial correction in the case of other types of agency action which Congress has withdrawn from judicial review jurisdiction.[24] We also need not consider whether a basis for this exception would be established by an agency's failure, evident on the face of the papers, to enter even a one-day suspension order that maintains the the agency's ability to require a substantiation of the rate increase and to provide effective refunds for rate increases not substantiated.

IV. Notice to the Public

Section 205(d) of the Federal Power Act, 16 U.S.C. § 824d(d) (1964), provides:

> Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public.

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[24] *See* Leedom v. Kyne, 358 U.S. 184 (1958); Long Island RR. Co. v. United States, 193 F. Supp. 795 (E.D.N.Y. 1961) (three-judge court); Int'l Ass'n of Mach. & Aerospace Workers v. Nat'l Mediation Bd., 138 U.S.App.D.C. 96, 105, 425 F.2d 527, 536 (1970); Int'l Bro. of Teamsters v. Brotherhood of Ry., A. & S. Clerks, 131 U.S. App. D.C. 55, 64, 402 F.2d 196, 205, *cert. denied sub nom.* Brotherhood of Ry. A. & S. Clerks v. National Mediation Board, 393 U.S. 848 (1968); Int'l Ass'n of Tool Craftsmen v. Leedom, 107 U.S.App.D.C. 268, 276 F.2d 514 (1960).

The FPC has issued implementing regulations which we consider below.

Edison submitted its initial rate filing on January 29, 1970. On March 17, 1970, the FPC Secretary wrote Edison a letter requesting additional information, including cost and cost of service information, "in order to complete your filing" because, "[a]fter reviewing the entire filing the staff finds the filing deficient." Certain questions were required to be answered "to permit the staff to analyze your filing." Edison submitted the requested information on March 30, 1970, and the FPC found that its filing was not complete until that date. (Order of April 29, 1970, R. 581). In response to Edison's request, the FPC set the effective date of the rate increase at May 1, 1970.

The complaint put to us by the Towns, supported by Boston Gas Co., as amicus curiae, is that the FPC committed reversible error in permitting the filing to become effective only thirty days after completion because the FPC's regulations also contain § 35.13(b)(4)(i), which we shall refer to as the 60-day provision. This requires that

> "if the rate schedule provides for an increased rate, then 60 days prior to the date that such changed rate is proposed to become effective the filing utility shall submit a statement showing its cost of the service to be supplied under the new rate schedule . . . . . Simultaneously, the public utility shall submit [certain] material on sales and revenues . . . and, unless the rate schedule containing the proposed increased rate is likewise simultaneously filed, a summary statement of such proposed increased rate."

FPC counsel argues that the 60-day provision means only that the Commission Staff requires certain information 60 days prior to the effective date; the public is provided 30 days notice of the rate schedule by the statute and § 35.3 of the Regulations, and the public received such notice in this case.

The information required by the 60-day provision is different from the actual filing. Its requirement of a "summary statement" of the proposed increased rate is applicable only if the actual rate schedule is not simultaneously filed. This summary statement "shall not be in lieu of the rate schedule."

However the 30-day requirement of the law has been implmented by FPC regulations. In particular 18 C.F.R. § 35.2 provides, in para. (e):

> "(e) *Effective date.* As used herein the 'effective date' of a rate schedule shall mean the date on which a rate schedule filed and posted pursuant to the requirements of this part is permitted by the Commission to become effective as a filed rate schedule. The effective date shall be 30 days after the filing date, or such other date as may be specified by the Commission."

And it further provides in para. (c):

> "(c) *Filing date.* The term 'filing date' as used herein shall mean the date on which a rate schedule filing is completed by the receipt in the office of the Secretary of all supporting cost and other data required to be filed in compliance with the requirements of this part, unless such rate schedule is rejected as provided in § 35.5. If the material submitted is found to be incomplete, the Secretary will so notify the filing utility within 30 days of the receipt of the submittal."

The 60-day provision of § 35.13(b)(4)(i), prescribed by the Commission in the event of rate increases, is included in the same part (Part 35) of the regulations, and the material required by the 60-day provision is one of the "requirements of this part" referred to in § 35.2(c).

The FPC's actions show that it thought that the 60-day requirement was applicable. After the FPC's April 29, 1970, Order, the Towns and Boston Gas pointed out the violation of the 60-day provision, § 35.13(b)(4)(i), claiming that they had insufficient time to arrange for tracking increases to their customers. In its Order Denying Joint

Motion for Emergency Amendment of Order issued May 26, 1970, the Commission stated that Edison had requested a filing date 30 days after its submission of the additional information requested by the FPC. "That request was, in essence, a request for waiver of our 60-day notice provision under the Regulations. The legal effect of our order was to waive the notice provision. . . ." If the 60-day provision was not applicable, there would have been no necessity for the Commission to waive it.

Section 1.7(b) of the FPC Rules of Practice and Procedure for petitions for waiver of rules. But Edison did not follow the Rule and make a formal petition for waiver. As Commissioner Carver said, dissenting from the May 26 Order:

> It is clear beyond doubt that the Commission could have waived the time requirements involved, but I think the plain fact is that it did not. Waiver of a regulation having the effect of law is not a matter to be taken lightly: to me, it requires a conscious, affirmative and specific intent and action thereon. The fact is that Section 35.13(b)(4)(i) of the Regulations played no part in the consideration of this matter. A Waiver may not be constructed out of an action which merely ignores the regulation.

While the FPC's handling of the matter leaves something to be desired, we find no basis on which this court may properly reverse the order before us. The data filed pursuant to the 60-day provision, §.35.13(b)(4)(i), is available to the public when filed. So we were advised at oral argument. That does not mean that the public has a right that is enforceable in court to insist on a utility's adherence to this section, either as to contents or timeliness of the utility's filing. We think the applicable doctrine is provided by *American Farm Lines* v. *Black Ball Freight Service, supra*. In that case, appellant applied to the ICC for temporary operating authority but failed to comply

strictly with certain ICC rules requiring particular information to be set forth in support of such applications."[1] The ICC granted the temporary authority and other carriers protested. The Court described the problem before it as follows (397 U.S. at 538):

> It is argued that the rules were adopted to confer important procedural benefits upon individuals; in opposition it is said the rules were intended primarily to facilitate the development of relevant information for the Commission's use in deciding applications. . . .

The Court held that the ICC had discretion to accept and act on applications that adequately, if not literally, complied with its rules. Such "rules were not intended primarily to confer important procedural benefits upon individuals," *Id.*, and are best treated "not as inflexible procedural conditions but as tools to aid the Commission in exercising its discretion. . . ." (*Id.* at 539).

Similarly in the case before us we think the 60 day provision of the regulations, set forth in § 35.13(b)(4)(i), was designed to enhance the ability of the FPC Staff to make the important threshold decision expeditiously upon the filing of the later statutory 30-day notice, as to whether to order an investigation and hearing, or a suspension, or both. When Part 35 of the FPC Regulations as completely amended to its present form, the FPC stated, "More detailed cost and other data will be required hereafter in support of rate schedule submittals, which will enable the Commission to process rate schedule filings more expeditiously." Order No. 271, 28 Fed. Reg. 10572, 30 FPC 850 (1963). While we do not think it can fairly be said that the FPC "waived" its 60-day filing requirement, we con-

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[1] To establish an immediate and urgent need for the service, applications were required to show efforts made to obtain it and names and addresses of existing carriers failing to provide it.

clude that this requirement does not confer a procedural benefit on other parties that entitles them to secure a judicial reversal in the event of non compliance.

The rights of interested parties are established by the statute, which provides for 30 days' notice. 16 U.S.C. § 824(d). The FPC Regulations, § 35.8, provide for submission of comments by "any purchaser or interested party" within 20 days of the filing date. In ordinary course a utility proposing a rate increase will have complied with the 60 day provision and the purchaser will have more notice, in substance, than is safeguarded by this 20 day provision. The utility would not lightly take the risk of a failure to observe the 60 day requirement and of the Commission's consequent rejection or delay of its rate filing for failure to comply with the 60 day provision.

The Commission's order shows that it considered all timely comments. The FPC's failure to require observance of the 60 day provision, and of the notice afforded thereby, does not entitle Petitioners to a judicial mandate vacating the FPC's order.

Affirmed.

JUDGMENT OF COURT OF APPEALS

No. 24,450

Municipal Light Boards of Reading and Wakefield, Massachusetts,

Petitioners

v.

Federal Power Commission,

Respondent

Boston Edison Company,

Intervenor

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

FILED October 14, 1971

Nathan J. Paulson
Clerk

Petition for Review of an Order of the Federal Power Commission

Before: BAZELON, Chief Judge, FAHY, Senior Circuit Judge, and LEVENTHAL, Circuit Judge.

JUDGMENT

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by the Court that the order of the Federal Power Commission on review herein is hereby affirmed.

Per Curiam.

For the Court

Nathan J. Paulson
Clerk

Dated: October 14, 1971

Opinion by Circuit Judge Leventhal

APPENDIX B

I. FPC Order Issued April 29, 1970

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman,
Lawrence J. O'Connor, Jr.,
Carl E. Bagge, and
John A. Carver, Jr.

Municipal Light Boards of Reading and Wakefield, Massachusetts, *Complainants*, Docket No. E-7400

v.

Boston Edison Company, *Respondent*

Norwood Municipal Light Department, Norwood, Massachusetts, *Complainant*, Docket No. E-7517

v.

Boston Edison Company, *Respondent*

Boston Edison Company Docket Nos. E-7485 and E-7533

ORDER DENYING MOTION TO REJECT SUBMISSION OF RATE CHANGE, SUSPENDING PROPOSED CHANGE IN RATE SCHEDULES, INSTITUTING INVESTIGATION, CONSOLIDATING PROCEEDING, PROVIDING FOR HEARING, AND GRANTING MOTION TO WITHDRAW MOTION TO REVIEW BOSTON EDISON COMPANY'S SERVICE

(Issued April 29, 1970)

This order denies a motion to reject proposed change in rates schedules, suspends for one day proposed rate schedule changes, institutes investigation of rates, charges, terms and conditions of jurisdictional rate schedules, provides for hearing, consolidates proceedings for purposes of hearing and decision, and grants a motion to withdraw a previously filed motion requesting review of electric service rendered by a public utility.

Boston Edison Company (Edison), a public utility subject to the jurisdiction of this Commission, on January 29, 1970, tendered for filing its rate schedule, General Service For Resale, consisting of (1) general terms and conditions, (2) rate for all requirements service, and (3) definition and special conditions of all requirements service.[1] In its tender, Edison stated that Rate S-1 was to supersede its Wholesale Electric Utility Rate M (Rate M) and to supersede its submission on March 11, 1968, of High Tension Wholesale Municipal Utility Rate N-1, General Terms and Conditions for Sales for Resale, Miscellaneous Charges Nos. 1 and 2 (Rate N-1). Edison requested that Rate S-1 be made effective April 1, 1970. However, Edison's tender was deficient under our Regulations and was not completed until March 30, 1970. At that time, Edison requested that Rate S-1 be made effective 30 days after completion of filing, *i.e.*, April 30, 1970. By its Rate S-1 filing, Edison proposes to increase its annual billings by approximately $2,733,000 or 15.7% based upon the 12 month period immediately following the proposed effective date.

In support of its filing, Edison states that the continuing inflation of costs has made it necessary to increase its charges under Rate M and the proposed Rate N-1. Addi-

[1] The tender is designated in Appendix A attached hereto and is the subject of the proceeding in Docket No. E-7533. For brevity, this filing shall be referred to as "Rate S-1" throughout this order.

tionally, Edison asserts that Rate S-1 is designed to distribute its costs of service more equitably between resale customers and ultimate consumers and to provide revenues commensurate with its requirements and responsibilities. Edison further states that the new rate schedule is designed to eliminate to some extent the objections raised by some of its customers to its proposed Rate N-1.

Protests and objections to Rate S-1 were filed by Boston Gas Company (Boston Gas) and the Towns of Concord, Norwood, Wellesley, Reading, and Wakefield, Massachusetts. In general, the protesting customers request suspension and investigation of Rate S-1 and question certain items in the cost study submitted by Edison including, among other things, the use of an 8% rate of return, 10% Federal income tax surcharge, allocation of costs between wholesale and retail customers and the inclusion of a fuel clause. Additionally, the municipal customers question the validity of the proposed general terms and conditions for resale service and the definition and conditions of all-requirements service alleging that the notice requirement on installing generating equipment or purchasing from other sources is unduly restrictive. Further, the municipal customers contend that the proposed increase in charges to them cannot be absorbed and will have to be passed on to their retail customers.

On February 24, 1970, the Towns of Reading and Wakefield filed a motion requesting rejection of Rate S-1 on the basis of the initial incompleteness of Edison's filing under our Regulations. On March 6, 1970, Edison filed its answer in opposition to that motion asserting that it had complied with our Regulations. As noted above, Edison's filing at first was deficient, but was completed on March 30, 1970. Thus, we will deny the motion to reject.

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[2] New England Power Company stated that the new rate should be permitted to go into effect without suspension reserving its right, however, to participate in any future proceedings if formal investigation is ordered by the Commission.

Edison's contentions in support of its filing and the protest of its customers raise questions which can best be resolved through a public hearing. Thus, we are ordering a hearing to resolve those questions and we shall suspend for one day the rate schedule filing in Docket No. E-7533 in accordance with Section 205(d) of the Federal Power Act.

Rate N-1 was submitted for filing by Edison on March 11, 1968, for 115 kv service to its five municipal wholesale customers.[3] At present, Edison's only wholesale rate applicable to 115 kv service is its Rate M, under which Edison presently provides 13.8 kv service to its wholesale customers as well as 115 kv service for part of the requirements of New England Power Company.[4]

The proceeding in Docket No. E-7400 involves a filing by the Municipal Light Boards of the Towns of Reading and Wakefield, Massachusetts, on March 13, 1968, of an application and complaint against Edison, their supplier of power. Complainants request an interconnection order under Section 202(b) adn 202(c)[5] of the Act, assertion of Com-

[3]That submittal is designated as follows:

CUSTOMER	DESIGNATION
Concord, Massachusetts	Rate Schedule FPC No. 36
Norwood, Massachusetts	Rate Schedule FPC No. 37
Reading, Massachusetts	Rate Schedule FPC No. 38
Wakefield, Massachusetts	Rate Schedule FPC No. 39
Wellesley, Massachusetts	Rate Schedule FPC No. 40

With that submittal, Edison notified the Commission that it was withdrawing Rate N and that Rate N-1 was submitted in lieu thereof. Rate N was submitted for filing on December 21, 1967, and has not been formally acted upon by the Commission.

[4]Rate M service is rendered to municipals under Edison's Rate Schedule FPC Nos. 13 through 17; to New England Power Company under Rate Schedule FPC No. 10; and to Boston Gas Company under Rate Schedule FPC No. 3.

[5]The issue raised by the request for interconnection under Section 202(c) was resolved by the parties in the manner set forth in Complainants' letter of November 26, 1968, to the Secretary of this Commission.

mission jurisdiction over Edison's rates and charges for sales of energy to the Towns[6], and an investigation into Edison's rates, charges, classifications, practices, efficiencies, regulations, rules, contracts, and services under Rate M and the proposed Rate N-1.

Several conferences were held between the parties and our staff before the filing of Edison's answer to the complaint. No settlement was reached on the rate level of the present 13.8 kv and proposed 115 kv service nor on the terms and condition of service. However, it was agreed that Reading would apply for, and Edison would arrange for, a 115 kv interconnection at a point mutually agreed upon. The application has been filed by Reading and accepted by Edison. It is anticipated that 115 kv service to Reading will commence by November, 1970.

The complaint requests an investigation into the lawfulness of Rate M and Rate N-1. Complainants allege that Edison's rates are unreasonable due to, among other things, excessively high administrative and general expenses, as well as the incurrence of excessive costs allegedly due to imprudent operation of obsolete plants. They also object to numerous terms and conditions in those rate schedules including, among other things, Edison's alleged distinction between municipally-owned and investor-owned distributors, restraints on their purchase and resale of energy, removal of the fuel adjustment clause, and imposition of certain Miscellaneous Charges.

Edison, in its answer, asserts that its rate level and the terms and conditions for 115 kv service are just, reasonable and lawful. Edison further states that any investigation or hearing on its wholesale rates should be deferred until actual experience has been obtained on 115 kv service to Reading. We disagree. Several of the terms and conditions opposed by these Complainants relate to the conditions under which

[6]Edison, in its answer to the complaint, stated that it will not contest this Commission's jurisdiction over its sales to the Towns.

115 kv service is to be made available. Accordingly, any delay in ascertaining the proper terms and conditions of 115 kv service (whether under Rate M, N-1, S-1, or any deviation from those rate schedules) would be both unwarranted and unreasonable.

The proceeding in Docket No. E-7517 involves a complaint filed on December 23, 1969, by the Norwood Municipal Light Department, Town of Norwood, Massachusetts. In that complaint, Norwood requests the Commission to institute a formal investigation into Edison's jurisdictional rates, charges, classification, practices, and services for 115 kv service and to fix the same. Additionally, Norwood requests the Commission to order Edison to account for amounts collected under that service and to refund any portion found unjustified with interest.

In support of its complaint, Norwood states that it has entered into an agreement with Edison for 115 kv service and has sold bonds in the amount of $2,300,000, solicited bids, and executed contracts for construction of its portion of the facilities necessary for making the interconnection. Norwood states that under the normal course of events it would have its 115 kv facilities ready by May of 1971, but, as Edison has known for some time, the existing 13.8 kv facilities are inadequate to meet Norwood's anticipated peaks for the summer of 1970. Norwood states that Edison asserted that installation of additional 13.8 kv facilities to meet the anticipated load was too expensive and insisted that Norwood should meet those requirements by early construction of the new 115 kv line. Based on an understanding that Edison would provide it with a 115 kv transformer, Norwood agreed to an early construction date of its 115 kv lines. However, under this arrangement, Edison seeks to charge its Rate M rates for this service, but Norwood wants service under Rate N-1, which Edison would agree to if Norwood would rent two 115 kv transformers from it. Norwood states that, under Edison's proposal to rent transformers, it will lose the savings of Rate

N-1 despite its substantial investment in the early construction of those lines and the savings to Edison by this early construction. Additionally, Norwood alleges that certain terms and provisions of Rate N-1 are unjust and unreasonable as to it.

On February 16, 1970, Edison filed its answer to Norwood's complaint stating that its proposed Rate N-1 was submitted to this Commission but was not accepted for filing and has not become effective. Edison further states that, on January 29, 1970, Edison withdrew Rate N-1 when it filed its proposed Rate S-1 amending Rate M. Edison states that Rate S-1 is now applicable to all of its total requirements wholesale for resale customers and contains provisions for both high and low tension service. Edison further denies responsibility for the delay by Norwood in obtaining 115 kv transformer for its 115 kv. service. Thus, Edison asserts that, under its proposal to let Norwood use its transformer, it will in essence be rendering low tension service for which it must be properly compensated until Norwood's facilities will be ready in May, 1971. Edison further denies that it realizes any savings on Norwood's early construction of these facilities and denies that it insisted on such early construction.

The complaints and answers filed in Docket Nos. E-7400 and E-7517 raise questions of fact and law which can best be resolved by an investigation and a full public hearing wherein all parties may produce witnesses and adduce evidence on the record before an Examiner of this Commission. Accordingly, we are ordering investigations and hearings on these complaints.

In Docket No. E-7485, Edison tendered for filing a notice of termination of an agreement between it and Boston Gas which was suspended and a hearing ordered thereon by our order issued March 27, 1970. The proposed notice of termination seeks to eliminate the speical provisions of Rate M that was applied to Boston Gas. By its elimination, Boston Gas will receive service under Rate M unmodified or Rate

S-1, when that rate becomes effective. Boston Gas, however, has challenged the validity of Edison's filing of both the notice of termination in Docket No. E-7485 and Rate S-1 in Docket No. E-7533.

The complaints filed in Docket Nos. E-7400 and E-7517, the suspension proceeding in Docket No. E-7485, and the filing in Docket No. E-7533 contain common questions of law and fact that can best be resolved in a consolidated hearing. Accordingly, we are consolidating the proceedings in Docket Nos. E-7400, E-7517, E-7485, and E-7533 for purposes of hearing and decision.

In the consolidated proceeding, the Examiner should permit evidence and legal argument on the issue of the status of Rate N-1. In its Rate S-1 filing, Edison stated that Rate N-1 was thereby superseded. In its answer to Norwood's complaint, Edison stated that its Rate N-1 submittal was withdrawn by its Rate S-1 filing. On the other hand, Norwood and Reading have filed for high-tension service under Rate N-1 and have issued bonds on that basis. Rate N-1, if effective, may be relevant to contentions involving refunds, if any, which might be ordered. Thus the issue of the status of Rate N-1 should be probed and a decision rendered thereon.

On March 27, 1970, Reading and Wakefield filed a motion requesting this Commission to investigate the alleged deterioration of electric service supplied by Edison. On March 31, 1970, those Towns filed a motion to withdraw their motion of March 27, 1970, without prejudice to their refiling a revised motion. We shall grant the motion to withdraw. On April 22, 1970, Reading and Wakefield filed a revised motion to reject the proffered rate submittal restating the general position of the municipalities. We do not reject Edison's filing. To the extent that the motion seeks other relief, it will be considered by the Commission following opportunity for answer by Edison.

The Commission further finds:

(1) Good cause exists to deny the motion filed by Reading and Wakefield on February 24, 1970, requesting rejection of Edison's submittal of Rate S-1 and to accept for filing Rate S-1.

(2) The proposed increased rates and charges contained in Rate S-1 have not been shown to be justified and may be unjust, unreasonable, unduly discriminatory, or preferential, or otherwise unlawful under the Federal Power Act.

(3) It is necessary and appropriate for the purposes of the Federal Power Act, particularly Sections 205, 206, 301, 307, 308 and 309 thereof, that the Commission enter upon a hearing concerning the lawfulness of the rates and charges and other provisions contained in Edison's proposed Rate S-1 and that Rate S-1 be suspended and the use thereof deferred as hereinafter ordered.

(4) It is necessary and appropriate for the purposes of the Federal Power Act to enter upon an investigation of the issues raised in the complaints filed by Reading and Wakefield in Docket No. E-7400 and by Norwood in Docket No. E-7517 and the answers to those complaints.

(5) Good cause exists for consolidating the proceedings in Docket Nos. E-7400, E-7517, E-7485, and E-7533 for purposes of hearing and decision.

(6) Good cause exists for granting the motion by Reading and Wakefield to withdraw without prejudice a previously filed motion seeking an investigation into the alleged deterioration of electric service supplied by Edison.

The Commission orders:

(A) The motion to reject Edison's submittal of Rate S-1 is hereby denied and Rate S-1 is hereby accepted for filing.

(B) An investigation is hereby ordered into the issues raised by the complaints and answers filed in Docket Nos. E-7400 and E-7517.

(C) The proceedings in Docket Nos. E-7400, E-7517, E-7485, and E-7533 are hereby consolidated for purposes of hearing and decision.

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Power Commission by the Federal Power Act and pursuant to the Commission's Rules of Practice and Procedure, a public hearing shall be convened to commence with a prehearing conference to be held on May 19, 1970, at 10:00 a.m. (EDT) at the offices of the Federal Power Commission in Washington, D.C. concerning all of the issues raised in the proceedings consolidated by this order.

(E) Pending such hearing and decision thereon, Rate S-1 is hereby suspended and the use thereof deferred until May 1, 1970. On that date, Rate S-1 shall take effect in the manner prescribed by the Federal Power Act; and Edison, subject to further orders of the Commission, shall charge and collect the increased rates and charges set forth in Rate S-1 for all power sold and delivered thereunder.

(F) Edison shall refund at such times and in such manner as may be required by final order of the Commission, the portion of the increased rates and charges found by the Commission in the consolidated proceeding not justified, together with interest at the rate of 8.0 percent per annum, from the date of payment to Edison until refunded; shall bear all costs of any such refunding; shall keep accurate accounts in detail of all amounts received by reason of the increased rates and charges effective as of May 1, 1970, for each billing period; and shall report (original and one copy) in writing and under oath, to the Commission monthly, for each billing period, the billing determinants of electric energy sold and delivered under Rate S-1, and the revenues resulting therefrom as computed under the rates in effect immediately prior to May 1, 1970, (including Rate N-1, if appropriate), and under the rates and charges made effective by this order, together with the differences in the revenues so computed.

(G) Unless otherwise ordered by the Commission, Edison shall not change the terms or provisions of Rate S-1 until this consolidated proceeding has been terminated or until the period of suspension has expired.

(H) Reading and Wakefield are hereby permitted to withdraw their motion filed on February 24, 1970, without prejudice to their refiling that or a revised motion.

(I) Notices of intervention and petitions to intervene in the consolidated proceeding may be filed with the Federal Power Commission, Washington, D.C. 20426, on or before May 18, 1970, in accordance with the Commission's Rules of Practice and Procedure (18 CFR 1.8 or 1.37).

By the Commission. Commissioner Carver dissenting filed a separate statement appended hereto.

(SEAL)

Gordon M. Grant
Secretary

BOSTON EDISON COMPANY

RATE SCHEDULE DESIGNATIONS
Filed: March, 30, 1970

Instruments: General Service for Resale, General Terms. Terms and Conditions
General Service for Resale, Rate for All Requirements Service, Rate S-1
General Service for Resale, Definition and Special Condition of All Requirements Service.

RATE SCHEDULE DESIGNATION	CUSTOMER
FPC No. 45 (Supersedes FPC No. 3 as supplemented)	Boston Gas Company

FPC No. 46 (Supersedes FPC No. 10 as supplemented)	New England Power Company
FPC No. 47 (Supersedes No. 13)	Town of Concord
FPC No. 48 (Supersedes FPC No. 14)	Town of Norwood
FPC No. 49 (Supersedes No. 15)	Town of Reading
FPC No. 50 (Supersedes FPC No. 16)	Town of Wakefield
FPC No. 51 (Supersedes FPC No. 17)	Town of Wellesley.

Municipal Light Boards of Reading and Wakefield, Massachusetts, *Complainants,*	Docket No. E-7400
v.	
Boston Edison Company, *Respondent.*	
Norwood Municipal Light Department, Norwood, Massachusetts, *Complainant,*	Docket No. E-7517
v.	
Boston Edison Company, *Respondent*	
Boston Edison Company	Docket Nos. E-7485 and E-7533

(Issued April 29, 1970)

CARVER, Commissioner, *dissenting*:

Clearly, Boston Edison's rate increase filing in these dockets requires suspension for investigation, hearing and decision on the evidence. I must, however, voice objection to the discriminatory treatment reflected in the unexplained determination that the annual rate increase exceeding $2,733,000 be suspended for one day only.

These proceedings originate in a unilateral filing of a new wholesale rate schedule which will result in an average increase of more than 20% to six of Boston Edison's seven customers. Five of these are municipally operated distribution systems. In no recent case of similar magnitude has this Commission failed to impose the full five month suspension period permitted by Section 205(e) of the Federal Power Act. In *Duke Power Co.*, Docket No. E-7513, the order issued November 20, 1969, suspended a 5.54% increase approximating $1,650,000 annually for five months and similar action was taken in *Union Electric Co.*, Docket No. E-7525, on a proposed 10.7% increase involving $819,000 annually. The sole instance of a one-day suspension in the past year involves *Boston Edison Co.*, Docket No. E-7485, which is being consolidated herein. There, however, a minor adjustment in sale terms involved approximately $58,000 per year.

The reasons for a longer suspension period appear more compelling here than in the situations cited above. A rate increase which is larger in dollar amount and in percentage is being visited upon fewer affected customers. The impact of an unanticipated cost increase will fall most heavily on municipal distribution systems. By the very nature of their operations, such entities maintain narrower financial reserves and have less flexibility to change retail rate structures on short notice.

Apart from Commission practice, a conceivable case for short-term suspension might exist if the filed rates merely

related rate of return to increased production and delivery costs. That is not the case here; Boston Edison's proposed Rate S-1 incorporates fundamental changes in rate design and conditions of service. It is by no means apparent that they have such *prima facie* validity as to presage ultimate approval. Any "irretrievable loss" that might result from suspension for five months should be put in realistic perspective. Over the maximum suspension period, the increase sought by Boston Edison represents about six-tenths of one per cent of its total annual revenues from the sale of electricity. By contrast, the interim cost increase to its five municipal customers would exceed 5.5% of their total annual electric utility operating income. Any risk of uncertainty would thus work much harsher consequences upon the customer than the rate increase applicant.

The public interest is ill served by an action of this Commission which is so discriminatory on its face and so unsound in its potential impact on the affected Massachusetts consumers.

JOHN A. CARVER, JR.,
Commissioner

2. FDC Order Issued June 26, 1970

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Albert B. Brooke, Jr., Acting Chariman; Lawrence J. O'Connor, Jr., and John A. Carver, Jr.

ORDER ACCEPTING TENDERED DOCUMENT, TREATING IT AS MOTION FOR RECONSIDERATION AND DENYING THAT MOTION

(Issued June 26, 1970)

This order accepts the document tendered for filing by Municipal Light Boards and Departments of the Towns of Reading and Wakefield, Massachusetts (Towns) on May 28, 1970, treats it as a motion for reconsideration of our order issued April 29, 1970 and denies that motion.

On May 28, 1970, the Towns tendered for filing a document entitled "Application for Rehearing" which seeks rehearing of our order issued April 29, 1970, under Section 313(a) of the Federal Power Act and Section 1.34 of the Commission's Rules of Practice and Procedure. That order, however, was a procedural order that, *inter alia*, denied a motion to reject a rate increase filing, suspended that filing, and provided for a hearing on the lawfulness of the proposed rate increase. Accordingly, an application for rehearing under Section 313(a) of that order does not lie. See, *e.g.*, *F.P.C. v. Metropolitan Edison Co.*, 304 U.S. 375, 383; *Humble Oil & Refining Co. v. F.P.C.*, 334 F.2d 1002, 1007 (CA 3, 1964). Section 1.34 of our Rules does not enlarge the scope of appealable orders under the Federal Power Act. However, we shall treat the Towns' tender as a motion for reconsideration and shall, to the extent warranted, consider the substantive arguments advanced therein.

The arguments advanced by the Towns are arguments that have been urged in a number of filings made by them

and other parties to this proceeding, which were considered and denied by us in our orders issued April 29 and May 26, 1970. In summary, they allege that we erred (1) by not rejecting the rate proposal, (2) by accepting it for filing, and (3) by suspending it for only one day. In their arguments, they assert procedural irregularities and substantive deficiencies as bases for contending that we should have rejected and not accepted for filing the rate proposal filed by Boston Edison Company (Edison). However, the substantive issues raised by the Towns, *e.g.*, antitrust and anticompetitive contentions, quality of service rendered, etc., do not warrant rejection of this rate filing. Those matters may be relevant to the issue of rate level but are not relevant to the procedural issue of whether we should accept for filing or reject the rate increase proposal. This is especially true, as here, when the increased rates are being collected subject to refund. If the rate level is excessive, the Towns will receive refunds with interest. On the other hand, if we were to reject the rate proposal and then determine that the substantive contentions advanced by the Towns lack merit, Edison could not recover those lost revenues. In our judgment, the public interest requires adherence to the procedural decisions made in this proceeding.

The Commission finds:

(1) Good cause exists for accepting the document tendered by the Towns on May 28, 1970, and treating it as a motion for reconsideration.

(2) It is appropriate for purposes of the Federal Power Act that the motion referred to in (1) above be denied.

The Commission orders:

(A) The document entitled "Application for Rehearing" and tendered for filing by the Towns on May 28, 1970, is accepted and treated as a motion for reconsideration of our order issued April 29, 1970, in this proceeding.

(B) The Towns' motion for reconsideration of our order issued April 29, 1970, is hereby denied.

By the Commission. Commissioner Carver adheres to his original views set forth in his dissenting statements appended to the orders issued April 29, 1970, and May 26, 1970.

(SEAL)

Gordon M. Grant
Secretary

APPENDIX C

The Federal Power Act, 49 Stat. 457, as amended, 16 U.S.C. 824a provides in pertinent part:

Section 205

* * * * *

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either

completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified.

Section 313

* * * * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * * Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside order in whole or in part. * * *

No. 71-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

MUNICIPAL LIGHT BOARDS OF READING AND WAKEFIELD, MASSACHUSETTS,
Petitioners.

v.

FEDERAL POWER COMMISSION,
BOSTON EDISON COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR BOSTON EDISON COMPANY IN OPPOSITION

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February 11, 1972

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BOSTON EDISON COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR BOSTON EDISON COMPANY IN OPPOSITION

QUESTION PRESENTED

(A restatement of the question presented by petitioners)

Whether an order of the Federal Power Commission suspending the effectiveness of an electric rate increase and providing for a hearing is judicially reviewable in the absence of a clear showing that the Commission acted in excess of its delegated powers and contrary to the provisions of the Federal Power Act.

STATEMENT

After a series of demands and complaints advanced by its wholesale for resale, all-requirements electric utility customers, and negotiations with them extending over a period of at least two years (Petition, at App. 29-32), Boston Edison Company (Edison) on January 29, 1970 filed with the Federal Power Commission increased rates and charges for service to such customers (Rate S-1), requesting an effective date for the new rates of April 1, 1970. The filing data, compiled in accordance with the Commission's Regulations, showed that Edison was receiving a rate of return of 4.4% from this wholesale for resale service under its then current rate and that the new rate would produce an overall return on the business of 6.74% (6.12% on the Municipal Utilities' portion of the business) (Record, at 284, 823). The filing letter noted that "[t]he new rate schedule is designed to distribute the Company's costs of service more equitably between resale customers and ultimate consumers . . ." (Record, at 284).

The Federal Power Act provides that all rates and charges for transactions subject to the jurisdiction of the Federal Power Commission shall be filed with the Commission. Section 205(c). It provides that, unless for good cause the Commission waives the requirement, no change shall be made in filed rates and charges except after thirty days' notice. Section 205(d). Further, it provides that the Commission shall have authority, without answer or formal pleading by the public utility, to enter upon a hearing concerning the lawfulness of a rate change and if it does so, the Commission

> ". . . may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time it would otherwise go into effect; . . .

> in case of a proposed increased rate or charge, the Commission may . . . require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid such portion of such increased rates or charges as by its decision shall be found not justified. . . ." Section 205(e)

By order issued April 29, 1970 (Petition, at App. 26, *et seq.*), the Federal Power Commission permitted Edison's Rate S-1 to go into effect subject to refund after a one-day suspension on May 1, 1970, ruling that Edison's filing was completed thirty-one days earlier, on March 30, 1970.

Petitioners appealed the Federal Power Commission order of April 29, 1970 to the United States Court of Appeals for the District of Columbia, challenging the preliminary treatment accorded by the Commission to Edison's rate increase filing. After reviewing all of the factual allegations of petitioners, the Court below ruled:

> . . . the limited suspension order in this case is not subject to judicial review.
>
> Our ruling that the one-day suspension order is not subject to judicial review, either as to the granting of the one-day suspension or the denial of a five-month suspension . . . is in the context of the kind of claim presented to us—that there has been an abuse of agency discretion. We do not speak to a case where the claim is that the suspension action taken or declined by the agency is plainly without any statutory authority or in defiance of a "clear and mandatory" statutory command or reflects an error evident on the face of the papers—considerations which have been held to constitute an exception, a basis for judicial correction in the case of other types of agency action which Congress has withdrawn from judicial review jurisdiction. We also need not consider whether a basis for this

exception would be established by an agency's failure, evident on the face of the papers, to enter even a one-day suspension order that maintains the agency's ability to require a substantiation of the rate increase and to provide effective refunds for rate increases not substantiated. (footnotes omitted) (Petition, at App. 47-48)

REASONS FOR DENYING THE WRIT

1. The decision of the Court below is in accord with the prior holdings of this Court that the "power of suspension was entrusted to the Commission only". *Board of Railroad Commissioners* v. *Great Northern Ry Co.*, 281 U.S. 412, 429 (1930), *Arrow Transportation Co.* v. *Southern Ry Co.*, 372 U.S. 658, 667 (1963). In *Arrow*, the Court expressly noted the virtual identity of the suspension provisions of section 15(7) of the Interstate Commerce Act there involved with other statutes including section 205(e) of the Federal Power Act, although, of course, since such other statutes were not then before it, the Court stated that its holding with respect to section 15(7) of the Interstate Commerce Act did not "necessarily" govern the construction and application of such other suspension provisions.

2. We can find absolutely no conflict between the holding of the Court below—that the preliminary treatment by the Federal Power Commission of Edison's rate-increase filing, as reflected in the limited suspension order, is not subject to judicial review[1]—and any holdings of other United States Courts of Appeals.

The absolute lack of any conflict between the holding of the Court below and decisions of other circuits is highlighted by *Port of New York Authority* v. *United States*, 451 F. 2d 783 (CA 2, 1971). The Court in that case noted

[1] The Court below carefully excluded from its holding a case where the agency's action is plainly without any statutory authority or in defiance of a clear and mandatory statutory command, or reflects an error evident on the face of the papers.

it is an "unassailable" proposition that the initial decision of whether to suspend the effective date of proposed tariffs is within the sole discretion of the rate regulatory agency. It then considered the sole conflict which at one time did exist whether orders vacating prior suspension orders were reviewable and concluded that even that conflict had been resolved. In that context the Court said:

> "The basis of the decision in *Arrow* that to permit judicial interference with the Commission's suspension procedures would invite the very disruption in the orderly review of the lawfulness of proposed tariffs that Congress meant to preclude applies with equal force to the issue now before us." (451 F. 2d at 788)

There is no conflict between the holding of the Court below and either *Phillips Petroleum Co.* v. *F.P.C.*, 227 F. 2d 470 (CA 10, 1955), *certiorari denied sub nom. Michigan Wisconsin Pipe Line Co.* v. *Phillips Petroleum Co.*, 350 U.S. 1005 (1956) or with anything implicit in *Hunt Oil Co.* v. *F.P.C.*, 398 F. 2d 746 (CA 5, 1968). Neither *Phillips* nor *Hunt* involved any issue argued in the Court below. *Phillips* involved the interpretation of a contract between a gas producer and its customer and the Commission's lack of authority under section 4(e) of the Natural Gas Act to suspend the rate provisions of a contract in effect at the time the Commission first asserted jurisdiction over the sales covered by the contract. The only holding in *Hunt Oil Co.*, either implicit or explicit, involved the legality of any rate suspension at all in connection with an area rate proceeding. The Court below explicitly distinguished the claim before it as not involving a claim that a statutory mandate had been violated. (Petition, at App. 18).

3. The holding of the Court below is sound and represents the only viable interpretation of the statutory scheme of the Federal Power Act.

The Federal Power Act limits the rates and charges which can be imposed by public utilities, such as Edison, to those on file with the Federal Power Commission, subject to the standards of the Act. It does provide a mechanism whereby a public utility may file changes and collect different rates after 30 days notice. Section 205(d).

The Act then vests in the Commission the authority (but not the obligation), after notice of proposed rate change, to order a hearing, "without answer or formal pleading by the public utility," and provides that, if the Commission does order a hearing, the Commission *may* suspend the effectiveness of the new rates for up to 5 months and make the increased rates subject to refund with interest.

The foregoing statutory scheme sets forth the balance established by Congress between public utilities on the one hand and their utility customers on the other. Discretion as to whether a public utility must wait an additional five months before imposing increased charges is given to the Federal Power Commission, but once there is a suspension, the customer is protected against having to pay more than a rate determined to be just and reasonable under the Federal Power Act.[*]

The petitioners seek reversal of the one day suspension order in this case on the basis of factual allegations they made to the Federal Power Commission during the period of time between Edison's filing and the time the Commission had to perform its first act if it wished to provide for hearing, suspension and refund. Evidently petitioners feel that the Commission must initially accept their allegations as true and controlling and suspend the new rate for five

[*] The Court below explicitly did not decide whether the failure of the Commission to enter a suspension order that maintains its ability to require substantiation and to provide effective refunds would constitute the basis for another exception to its basic ruling. (Petition, at App. 18)

months or until the Commission shall have made a final determination on such allegations, if earlier than five months. Petitioners would thus remove the Commission's discretion concerning suspension and confer it on any customer who chose to complain about a proposed increase in rates.

Such is not the statutory scheme of the Federal Power Act, which provides further in the same section, 205(e),

> . . . the Commission shall give to the hearing and decision of such questions [the justness and reasonableness of the increased rate] preference over the other questions pending before it and decide the same as speedily as possible.

4. The action taken by the Commission in suspending for one day as distinguished from the maximum period permitted by the Act does not constitute final agency action which will cut off petitioners' rights or their opportunity to obtain judicial review of the ultimate agency action. When the hearings before the Commission are concluded and the justness and reasonableness of the filed rates are determined, such rates as so determined (whether those filed by Edison or lower rates if so found by the Commission) will then be effective for the whole of the period commencing after the one day suspension. If petitioners then seek judicial review of such final Commission action, such review will also encompass the full period beginning with the expiration of the suspension. Any amounts collected by Edison during that period in excess of just and reasonable rates, either as initially determined by the Commission or ultimately determined by it following judicial review, will be subject to refund with interest.

Clearly what the Commission decided, in exercising its discretion to suspend for only one day, was that on the face of the data available to it, there was good reason to believe that the newly filed rates were not in excess of the just and reasonable criterion. Having done so, if it suspended

for the maximum potential five month period, Edison would forever be unable to collect the increased rates for that period. Yet, even under those circumstances, such an act of suspension would not have been subject to judicial review at Edison's behest.

The strong presumption in favor of review of administrative action, as set forth in cases cited by petitioners, relates only to "final agency action" and even then is not applicable if there is "persuasive reason to believe that such was the purpose of Congress". *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). On both counts the petition herein fails. Not a one of the cases cited by petitioners are apposite. *Environmental Defense Fund, Inc.* v. *Hardin*, 428 F. 2d 1093, (CA DC, 1970) and *Barlow* v. *Collins*, 397 U.S. 159 (1970) are primarily standing cases where at risk was the loss of any judicial review whatsoever *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125 (1939) and *Abbott Laboratories*, as well as *Environmental Defense Fund* and *Barlow*, all present instances of review of final agency action.

Phillips Petroleum Co., supra, and *Cities Service Gas Co.* v. *F.P.C.*, 255 F.2d 860 (CA 10, 1958) do not involve the Commission's authority to suspend rates but contract rights between parties and follow the long established rule of *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (CA DC, 1954), *certiorari denied sub nom. Japan-Atlantic and Gulf Conference* v. *United States*, 347 U.S. 990 (1954), was also a contract case where the Court first determined that the relevant contract did not encompass a dual rate structure. It then ruled that the Maritime Commission was without statutory authority to approve such a structure without having held a hearing and that failure to suspend in that instance was equivalent to approval.

In this case, the petitioners are protected by the provisions of the Federal Power Act and the action of the

Federal Power Commission thereunder in that they will end up paying no more than the rate determined by the Commission subject to judicial review to be just and reasonable.

Petitioners attempt to use the general principal of reviewability of administrative action to forestall the day on which they must begin paying rates which the Commission determines to be just and reasonable. Such an attempt runs counter to the statutory scheme of the Federal Power Act as the Court below ruled in refusing to review the discretionary act of the Federal Power Commission suspending a rate increase for a period less than five months.[3]

5. In the last paragraph of point 3, Petition, at 12, petitioners finally enunciate the premise upon which they dispute the statutory scheme of the Federal Power Act. Tucked into the sentence there contained is the phrase

> . . . : and since refunds are inadequate to provide the requisite protection (*see F.P.C.* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962); *F.P.C.* v. *Hunt*, 376 U.S. 515 (1964)), it is apparent . . .

The statutory scheme of the Federal Power Act creates a Congressional balance between the rights of public utilities and those of its utility customers in regard to the collection of increased rates. In the case of an increased rate, such as is the subject matter of the Petition, it provides a potential five-month period (after 30 days' notice) during which

---

[3] It is undoubtedly true that equities are taken into account by the Commissioners in exercising the discretion given them by the Act. There are frequent cases in which all of the Commissioners do not agree upon the equities. *See Gulf Power Co.*, Docket No. E-7686, Order issued January 31, 1972, ____ F.P.C. ____; *Alabama Power Co.*, Docket No. E-7674, Order issued December 30, 1971, ____ F.P.C. ____; *Florida Gas Transmission Co.*, 34 F.P.C. 995, 998 (1965); *Utah Power & Light Co.*, 30 F.P.C. 885, 888 (1963).

the Commission is delegated the authority to decide the application of the Congressional balance. The Commission may decide that the public utility must forever forego collecting its increased rate for the full potential five month period, or the Commission may decide that the utility's customers must pay the increased rates during some of the potential five month period, subject to having refunded to them with interest any part of such increased rates later found in excess of a just and reasonable rate. To help it make its decision the Commission under its rule making power requires the filing of substantial data by the public utility and, by way of public notice, seeks comments of the utility customers and the public. *F.P.C. Regulations* Part 35.8, 18 C.F.R. 35.8 and Part 35.13, 18 C.F.R. 35.13.

Petitioners object to the Congressional balance in this case since the Commission decided that they should pay the increased rates subject to refund during the five month period (less one day). Public utilities have been known to object without success when the Commission decision went the other way.

The public utility has no relief — initially or ultimately — for any period of suspension. See dissent in *Gulf Power Co.*, *supra*, at fn. 3 *infra*. This stands in sharp contrast with any claimed inadequacy of right to receive refunds plus interest if the customer should ultimately prevail.

The petitioners fail to discuss directly the limited point which they raise in their Petition and therefore do not support their bold statement that the "ruling is unsound and, if not reversed, may have important and extensive legal and practical consequences." (Petition, at 7-8).

On the contrary, if this Court were to grant the writ and later reverse the Court below, the result would be to rewrite the Federal Power Act and to foster extensive interlocutory litigation at the expense of the express command of that Act that the Federal Power Commission give preference to the decision of the basic issue of justness and reasonableness of increased rates "and decide the same as speedily as possible."

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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February 11, 1972

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–23) is reported at 450 F. 2d 1341. The order of the Federal Power Commission (Pet. App. 26–39) is reported at 43 F.P.C. 626 and its order denying reconsideration (Pet. App. 40–42) is reported at 43 F.P.C. 950.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24–25) was entered on October 14, 1971. The petition for a writ of certiorari was filed on January 12, 1972. The jurisdiction of this Court is invoked under 28

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U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 8251(b).

QUESTION PRESENTED

Whether an order of the Federal Power Commission pursuant to Section 205(e) of the Federal Power Act, 16 U.S.C. 824d(e), suspending the effectiveness of a rate increase filing by a public utility for one day pending a hearing and decision on the lawfulness of the filing is subject to judicial review on the ground that the Commission abused its discretion in not ordering suspension for a longer period.

STATUTE INVOLVED

Section 205(e) of the Federal Power Act, 16 U.S.C. 824d(e), is set forth at Pet. App. 43–44.

STATEMENT

In January 1970, the Boston Edison Company filed with the Federal Power Commission pursuant to Section 205 of the Federal Power Act, 16 U.S.C. 824d, a rate schedule to supersede an existing schedule, which contained certain changes in the terms of service and an increase in rates (Pet. App. 2, 27). Petitioners—two municipal electrical distribution systems—urged the Commission to reject Edison's rate filing, contending that the filing was deficient in several respects and that its service terms violated national antitrust policies. Alternatively, petitioners requested that the effectiveness of the rate filing be suspended for the maximum statutory period—five months—and that the filing be made the subject of an investigation and hearing (Pet. App. 2–3, 28).

In April 1970, the Commission issued an order (Pet. App. 26–37) denying petitioners' motion to reject the filing, suspending the effectiveness of Edison's proposed rate schedule for one day until May 1, 1970, at which time it became effective, and scheduling a hearing on the new rates. The order also required Edison to make refunds in the event any portion of the rate increase was subsequently found not to be justified (Pet. App. 28, 34–35). Commissioner Carver dissented on the sole ground that the filing should have been suspended for longer than one day (Pet. App. 3, 38–39). Petitioners' subsequent motion to have the effective date of the rate increase postponed to enable them to adjust their retail rates and pass on the increase to their customers was denied (Pet. App. 3). Petitioners then sought rehearing of the Commission's April order, which the Commission treated as a motion for reconsideration and denied (Pet. App. 40–41).

On appeal, the court of appeals unanimously affirmed (Pet. App. 1–23). Relying on this Court's decision in *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, and other cases arising under statutory suspension provisions similar to Section 205 of the Federal Power Act, the court held that the one-day suspension order was not subject to judicial review with respect to either the granting of the one-day suspension or the denial of a five-month suspension. The court noted that petitioners had alleged only that the Commission had abused its discretion in refusing to grant a five-month suspension; accordingly, this was not a case where "the suspension action taken

or declined by the agency is plainly without any statutory authority or in defiance of a 'clear and mandatory' statutory command or reflects an error evident on the face of the papers * * *" (Pet. App. 17–18).

ARGUMENT

The decision below is correct. There is no conflict with decisions of this Court or other courts of appeals or any other reason for plenary review.

1. Petitioners argue that the Commission's decision to suspend Edison's proposed rate increase for only one day was an abuse of discretion and is subject to judicial review.[1] That such a decision is not subject to judicial review, however, is strongly suggested by this Court's decision in *Arrow Transportation Co.* v. *Southern Ry. Co., supra.*[2] In holding that the courts lacked the equitable power to extend the maximum suspension period authorized under Section 15(7) of

[1] Petitioners' contention (Pet. 12) that, save in exceptional cases, the Commission cannot suspend the effectiveness of a rate filing for less than five months is plainly without merit. Section 205(e) of the Federal Power Act provides that the Commission "may" suspend rate filings, "but not for a longer period than five months * * *." The very terms of the provision indicate that the Commission may in its discretion order a suspension for any period up to five months. In the past ten years, there have been thirteen electric rate increase proposals suspended by the Commission under Section 205(e), nine for five months and four for one day.

[2] As the court below noted (Pet. App. 16–17), there is substantial authority for the proposition that a decision by the Commission to accept a rate filing, in lieu of suspending it, would not be subject to judicial scrutiny. See, *e.g.*, *Luckenbach Steamship Co.* v. *United States*, 179 F. Supp. 605, 609–610 (D. Del.), vacated as moot, 364 U.S. 280; *National Industrial Traffic League* v. *United States*, 287 F. Supp. 129 (D.D.C.), affirmed *per curiam*, 393 U.S. 535.

the Interstate Commerce Act, 49 U.S.C. 15(7), and imposed by the Interstate Commerce Commission with respect to a new rate filing, the Court concluded that Congress intended to vest in the Interstate Commerce Commission the sole and exclusive power to suspend the effectiveness of proposed new rates and "to foreclose a judicial power to interfere with the *timing* of rate changes * * *" (emphasis in original). 372 U.S. at 668. Section 205(e) of the Federal Power Act is virtually identical to Section 15(7) of the Interstate Commerce Act and, while the Court in *Arrow Transportation* noted that its decision would not necessarily govern the construction of Section 205(e) (372 U.S. at 666, n. 13), petitioners have pointed to nothing suggesting that Congress intended to distinguish between the suspension authority granted to the two federal agencies under the two statutes.

Thus, judicial review of the Commission's suspension decision in the present case would constitute the very thing proscribed by *Arrow Transportation:* judicial interference with the *timing* of rate changes. Moreover, as the court below noted (Pet. App. 16–17), the one-day suspension benefits petitioners since, as a result of the suspension, Edison has the burden of proof to justify its rate increases before the Commission and must make refunds with interest of any portion of the increase later found to be unjustified.

The conclusion that suspension orders are not subject to judicial review is not undermined by this Court's decision in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, and its progeny. In that case, the Court held that "judicial review of a final agency action by

an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." 387 U.S. at 140; see also *Barlow* v. *Collins*, 397 U.S. 159, 174. Because suspension orders are procedural and not "final agency action," see, *e.g.*, *Humble Oil & Refining Co.* v. *Federal Power Commission*, 236 F. 2d 819 (C.A. 5), certiorari denied, 352 U.S. 967, *Hunt Oil Co.* v. *Federal Power Commission*, 236 F. 2d 828 (C.A. 5), certiorari denied, 352 U.S. 970,[3] and because Congress has entrusted the *timing* of rate increases to the Commission's discretion, the inference is compelling that such orders are not subject to judicial review.

2. Contrary to petitioners' claim (Pet. 7), there is no conflict between the decision of the court below and the holdings of the Tenth Circuit in *Phillips Petroleum Co.* v. *Federal Power Commission*, 227 F. 2d 470 (C.A. 10), certiorari denied *sub nom. Michigan Wisconsin Pipe Line Co.* v. *Phillips Petroleum Co.*, 350 U.S. 1005; and the Fifth Circuit in *Hunt Oil Co.* v. *Federal Power Commission*, 398 F. 2d 746 (C.A. 5). In *Phillips*, the court of appeals held that the Commission's order suspending a rate filing was reviewable because it presented a question of law involving construction of a contract. 227 F. 2d at 475–476.[4] In *Hunt*, the Fifth Circuit reviewed a suspension order of the Commission because of allegations that the

[3] These cases involved Section 4 of the Natural Gas Act, 15 U.S.C. 717c, which is virtually identical to Section 205 of the Federal Power Act.

[4] A similar question was presented in *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F. 2d 860 (C.A. 10), cited by petitioners (Pet. 10).

Commission not only abused its discretion but also exceeded its statutory authority. 398 F. 2d at 748.[5] As the court below recognized (Pet. App. 18), limited judicial review in such instances may be proper.

3. Petitioners' reliance (Pet. 14–16) on the body of cases headed by *Amarillo-Borger Express, Inc.* v. *United States*, 138 F. Supp. 411 (D.C. N.D. Tex.), vacated as moot, 352 U.S. 1028, to support the reviewability of suspension orders overlooks the fact that at the time of its decision in *Arrow Transportation, supra*, this Court was aware of these cases as well as contrary holdings by lower courts. 372 U.S. at 667, n. 15, and 670, n. 21. Nevertheless, the Court concluded that Congress had foreclosed the judiciary from interfering with the timing of rate changes. 372 U.S. at 668. Indeed, only recently, another court of appeals has stated: "We believe that *Arrow* [*Transportation*] has resolved this conflict in favor of those courts holding no review." *The Port of New York Authority* v. *United States*, C.A. 2, No. 71–1769, *et al.*, decided November 9, 1971, slip op. pp. 453–454.

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[5] Petitioners' reliance (Pet. 12) on *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803 (C.A. 4), is also misplaced. The issue of suspension for less than five months was not before the court or the Commission.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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October Term 1971

MUNICIPAL LIGHT BOARDS OF READING AND WAKEFIELD, MASSACHUSETTS,

Petitioners,

v.

FEDERAL POWER COMMISSION, BOSTON EDISON COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS

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BOSTON EDISON COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS

Neither of the Respondents takes issue with the importance of the question presented in this proceeding. Rather, both seek to create the impression that the resolution of the question by the court below was sound and in accordance with the applicable precedents. However, while Respondents advance various arguments allegedly supporting that conclusion, we show below, as indeed we have already shown in large part in our Petition, that Respondents' arguments are themselves invalid and their conclusion unsound.

1. Unlike the court below (Pet. App. 13-16) and Respondent Boston Edison Company (Br. in Opp., p. 4), Respondent Federal Power Commission (Br. in Opp., p. 4) recognizes that the *Arrow* case[1] is not controlling on the question here presented. However, the Commission tries to derive as much comfort as possible from *Arrow* by asserting (Br. in Opp., p. 4) that the absence of judicial review with respect to its one-day suspension of the Edison rate increase is nevertheless "strongly suggested" by this Court's decision in that case. But whether or not, as the Commission goes on to argue, *Arrow* should, therefore, be extended to the instant situation is a question which properly should be decided only after briefing on the merits.

This is particularly so since not only did this Court go out of its way in *Arrow* expressly to note that its holding would not necessarily apply under other statutes such as the Federal Power Act here involved (372 U.S. at 666, fn. 13), but the question before the Court there was very different, i.e., the existence of *original* jurisdiction in the district courts to suspend the effectiveness of a proposed rate change *beyond* the period provided in the Interstate Commerce Act. The Court's holding that the district court lacked such jurisdiction obviously should not be dispositive of the question here, i.e., the jurisdiction of the Court to *review* for abuse of discretion, under the usual statutory review provisions, an agency refusal to suspend a proposed rate, all *within* the period authorized by the controlling statute. In this connection, it should be also noted that this Court expressly took into account the fact that the action before it did not involve review jurisdiction by commenting (372 U.S. at 671) that the contrary procedure

> "* * * would permit a single judge to pass before final Commission action upon the question of reasonableness of a rate, which the statute expressly entrusts only to a court of three judges reviewing the Commission's completed task (fn. omitted)."

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[1] *Arrow Transportation Co. v. Southern Railway Co.*, 372 U.S. 658 (1963).

Judicial review of Commission action with regard to suspension of rates under Section 205(e) would no more interfere with "the timing of rate changes" (Comm. Br. in Opp., p. 5) than does court review of the rate changes themselves. As this Court recognized in *Arrow*, the jurisdiction of the courts under the typical judicial review provisions extends to agency rate determinations (372 U.S. at 670-671; see also e.g., *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)), and, of course, the courts also have the authority, as an incident to such judicial review, to stay the effectiveness of the rate order involved. Cf. *F.P.C. v. Interstate Natural Gas Co.*, 336 U.S. 577 (1949). To be sure, the scope of the review of such matters is narrow and limited to questions of law, but abuse of discretion has long been treated as error of law for those purposes. See e.g., Administrative Procedure Act, 5 U.S.C. 706.[2]

2. Nor is there any merit in the further argument of both the Commission (Br. in Opp., p. 6) and Edison (Br. in Opp. pp., 7-8) that the Commission's order here involved does not constitute "final agency action" ripe for judicial review. While it is, of course, true that the order is not "final" in the sense that its issuance came at the conclusion of the proceeding, such a requirement has long been discarded as far as judicial review is concerned. Under the more modern thinking, orders shy of the order issued at the conclusion of the proceeding are subject to judicial review if their effect nevertheless is finally to determine rights of the parties with regard to the particular matters involved. See, e.g., *Phillips Petroleum Co. v. F.P.C.*, 227 F.2d 470 (10th Cir., 1955), *cert. denied, sub nom. Michigan Wisconsin Pipe Line Co. v. Phillips Petroleum Co.*, 350 U.S. 1005 (1956); *EFD v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir., 1970); *Greene County Planning Board v. F.P.C.*, 2d Cir. No. 71-1991 (issued January 17, 1972), pp. 1418-1419. As stated in *EFD v. Hardin, supra*, in holding subject to review the Agriculture Secretary's failure to suspend the required registration of a pesticide pending completion of the permanent cancellation proceedings (428 F.2d at 1098):

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[2] If *Arrow* were in fact applicable, it would preclude review of Commission suspension orders generally and not limit non-reviewability to abuse of discretion, as the court below would have it (Pet. App. 18).

> "The doctrine of ripeness and finality are designed to prevent premature judicial intervention in the administrative process, before the administrative action has been fully considered, and before the legal dispute has been brought into focus [fn. omitted]. No subsequent action can sharpen the controversy arising from a decision by the Secretary that the evidence submitted by petitioners does not compel suspension or cancellation of the registration of DDT."

So here, also, no subsequent action by the Commission can sharpen the controversy with regard to the propriety of not continuing the pre-filing rates in effect during the five-month suspension period provided in Section 205(e). As pointed out in our Petition (at pp. 9-10), the effect of the Commission's refusal to suspend Edison's new rates for the full five months is finally to determine that Edison need not charge the pre-filing rates during that period. Since that Commission action would be unaffected by the subsequent Commission proceedings involving the validity of Edison's rate proposal generally, the Commission's order here involved plainly constitutes "final agency action" with regard to the proper rates during the five-month statutory period and as such is reviewable under judicial review provisions contained in Section 313(b).[3]

3. Edison's further argument (Br. in Opp., pp. 11-13) that the Act gives the Commission unbridled discretion whether or not to suspend a rate filing distorts the statutory scheme. As pointed out in our Petition (at pp. 11-13), the pertinent statutory language clearly envisions that absent exceptional circumstances, new rates are to be suspended for the full five-month period provided unless the case is decided earlier - a reading which is fully supported by the legislative history of the suspen-

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[3] *Humble Oil & Refining Co. v. F.P.C.*, 236 F.2d 819 (5th Cir. 1956), *cert. denied*, 352 U.S. 967 (1957) and its companion, *Hunt Oil Co. v. F.P.C.*, 236 F.2d 828 (5th Cir. 1956), *cert. denied* 352 U.S. 970 (1957), cited by the Commission (Br. in Opp., p. 6) are distinguishable. In these cases, the companies went far beyond the matters finally determined by the suspension order and sought to raise questions attacking the validity of the basic proceedings.

sion provision contained in Section 15(7) of the Interstate Commerce Act (49 U.S.C. 15(7)), from which Section 205(e) was derived. See *Hope Natural Gas Co. v. F.P.C.*, 196 F.2d 803, 806-807 (4th Cir. 1952).

In other words, in line with the Federal Power Act's long recognized objective to protect the consumers against excessive rates (see, e.g., *Hunt Oil Co. v. F.P.C.*, 398 F.2d 746, 750 (5th Cir. 1968) "Congress intended [by the suspension provisions] to protect consumers from increased rates until the Commission would fix just and reasonable rates but it considered that a period of five months would be the maximum time permitted." *Hunt Oil Co. v. F.P.C., supra*, at 750; see also *Hope Natural Gas Co. v. F.P.C., supra*, at pp. 806-808; *Phillips Petroleum Co. v. F.P.C., supra* at p. 474.[4]

[4]Edison's assertion (Br. in Opp., pp. 6-7) that Petitioners seek reversal of the one-day suspension order on the basis of Petitioners' factual allegations misstates Petitioners' position. As noted in our Petition (at p. 6), it is our position that, read in light of the statutory history and the Commission's own gloss, Section 205(e) requires the Commission to suspend major rate filings for the full statutory period in the absence of exceptional circumstances. Not only has the Commission made no finding of exceptional circumstances in this case, but the findings which it did make and on which it based its suspension of only one day (Pet. App., pp. 34-35) are indistinguishable from the findings customarily made in connection with full five-month suspensions.

WHEREFORE, for the foregoing reasons together with those set out in the Petition herein, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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